85-924

No.

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JOHN M. MURPHY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Where a trial judge failed to disclose on the record both his close personal relationship, as well as his plans for post-trial vacation with the prosecutor, both of which facts were then unknown to defendant, and where the trial judge also advanced defendant's sentencing to accommodate those plans, does a Seventh Circuit Court of Appeals decision (affirming the trial court's denial, without hearing, of defendant's post-trial motion under 28 U.S.C. 455(a) for disqualification of the trial judge and for new trial), which conflicts with decisions of all other Circuit Courts of Appeal and with the Seventh Circuit's prior decisions and which otherwise represents an extraordinary departure from the accepted and usual course of appellate review, warrant certiorari. (In No. 85-1401)

2. Whether our system of justice will tolerate a judicially manufactured theory of good faith perjury and subornation to insulate government agents and prosecutors while acting within their self-perceived scope of employment; and whether a general intent of furnishing temptation to potential criminals absolves such persons as a matter of law, from culpability for *any* breach of common or statutory law. (In No. 84-2398)

3. Whether the "Operation Greylord" investigation of the Cook County, Illinois Circuit Court (the "sting" referred to above) growing out of contrived cases the exact number was foreclosed from inquiry by the trial judge falsely initiated on sworn complaints and proceeded to trial through perjured testimony in state courts by F.B.I. Agents, coached and staged by federal prosecutors all of which conduct was endorsed by the Decision of the U.S.C.A. for the Seventh Circuit as honorable activity, is a proper and necessary intrusion into State domain. (Idem)

4. Whether the letter, purpose and intent of the Fifth Amendment requiring indictment by grand jury for felony tolerates such indictment being had on information supplied by federal prosecutors. (Idem)

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented | i-ii |
| Prayer | 1 |
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2-4 |
| List of Parties to the Proceeding | 4 |
| Statement of the Case and Statement of Facts | 4-12 |
| Reasons for Granting the Writ | 12-24 |
| Conclusion | 25 |
| Appendices | |
| Appendix A, Decision of the United States Court of Appeals | App. 1a-35a |
| Appendix B Order Denying Petition for Rehearing | App. 36a |
| Appendix C Judgment Order and Sentence of the United States District Court dated Aug 8, 1984 | App. 37a-38a |

## TABLE OF CASES


| | PAGE |
|---|---|
| *Dobson* v. *Camden*, 502 F. Supp. 679 | 17 |
| *Fredonia Broadcasting Corp.* v. *RCA*, 569 F. 2d 251 (5th Cir. 1978) | 17, 20, 21 |
| *Groves* v. *IBT*, 581 F.2d 1241 (CA-7, 1978) | 15, 16, 20 |
| *Hall* v. *SBA*, 695 F.2d 175 (CA-4, 1983) | 15, 17, 18, 19 |
| *Hampton* v. *United States*, 925 U.S. 484 (1976) | 23 |
| *Home Placement Service* v. *Providence Journal Co.*, 739 F.2d 674 (1st Cir., 1984) | 15, 16, 19 |
| *Idaho* v. *Freeman*, 507 F. Supp. 706 | 20 |
| *In re IBM Corp.*, 618 F.2d 923 (CA-2, 1980) | 15 |
| *In re Olson*, 20 B. R. 206 (8th Cir.) | 14, 16 |
| *In re United States*, 666 F.2d 690 (1st Cir., 1981) | 15 |
| *Margoles* v. *Johns*, 660 F.2d 291, 300 (7th Cir., 1981) | 16 |
| *Marshall* v. *Jerrico Inc.*, 446 U.S. 238 (1980) | 13 |
| *McCuin* v. *Texas Power & Light Co.*, 714 F.2d 1255 (CA-5, 1983) | 15, 19 |
| *Miller Industries* v. *Caterpillar Tractor Co.*, 516 F. Supp. 84 | 17 |
| *Ofutt* v. *United States*, 348 U.S. 11 (1954) | 12 |
| *Olmstead* v. *United States*, 277 U.S. 433 (1928) | 23 |
| *People* v. *Jackson*, 32 Cr.L. 2178 | 17-18 |
| *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458 (CA-7, 1985) | 15, 16 |
| *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101 at 112 (5th Cir., 1980) | 13, 16, 19, 20 |
| *Rice* v. *McKenzie*, 581 F.2d 1114 (4th Cir., 1978) | 14, 16 |
| *Roberts* v. *Bailar*, 625 F.2d 125 (CA-6, 1980) | 15, 19 |

PAGE

*SCA Services, Inc.* v. *Morgan*, 557 F.2d 110 (CA-7, 1977) ..... 15, 16, 20
*United States* v. *Archer*, 486 F.2d 670 (2nd Cir., 1973) ..... 22-23
*United States* v. *Cerrella*, 529 F. Supp. 1376 ..... 17
*United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir., 1974) ..... 12
*United States* v. *Conforte*, 624 F.2d 869 (CA-9, 1980) ..... 15
*United States* v. *Ellison*, 557 F.2d 128 (CA-7, 1977) ..... 4, 7
*United States* v. *Ferguson*, 550 F. Supp. 1260 ..... 17
*United States* v. *Heldt*, 668 F.2d 1238, (D.C. Cir., 1981) ..... 15
*United States* v. *Mirkin*, 649 F.2d 78 (CA-1, 1981) 15
*United States* v. *Nobel*, 696 F.2d 231 (CA-3, 1982) 15
*United States* v. *Poludniak*, 657 F.2d 948 (CA-8, 1981) ..... 15
*United States* v. *Ritter*, 504 F.2d 948 (CA-8, 1976) 15
*United States* v. *Rosner*, 458 F.2d 1213 (2nd Cir., 1973) ..... 23
*United States* v. *Rovetusso*, 768 F.2d 809 (CA-7) ... 13
*United States* v. *Sibla*, 624 F.2d 864, 867-8 (9th Cir., 1980) ..... 16
*Word* v. *McEwen*, 644 F.2d 797 (9th Cir., 1981) .... 15, 20

**Statutes**

18 U.S.C. § 1961 ..... 3
18 U.S.C. § 1962(c) & 1962(d) ..... 3, 4
18 U.S.C. § 3500(e) (2) & (3) ..... 3
18 U.S.C. 1951 ..... 5
28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 455 & 455(a) ..... 2, 4, 7, 13, 16, 21

## Illinois Statutes

PAGE

Cha. 38, 33-1, Ill. Rev. Stats ..... 3-4

## Constitutional Provisions

Fifth Amendment..... 2, 24

## Rules of Federal Procedure

Rule 33..... 4, 7

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## PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

## PRAYER

Petitioner, JOHN M. MURPHY, Defendant-Appellant in the Court below, respectfully prays that a Writ of Certiorari issue to review the Opinions of the United States Court of Appeals for the Seventh Circuit entered in this case.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the conviction of your Petitioner on 24 Counts of a 27 Count Third Superceding Indictment is reported at 768 F.2d 1518, and is reproduced in the Appendix hereto (Appendix A).

## JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on July 19, 1985 (Appendix A). A Petition for rehearing and suggestions for rehearing En Banc, timely made, was denied on September 27, 1985 (Appendix B). This petition is filed within 60 days thereof. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The first clause of the fifth amendment amendment to the constitution of the United States reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . .

## FEDERAL STATUTORY PROVISIONS

Title 28 U.S.C. § 455 provides in pertinent part as follows:

**§ 455. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 18 U.S.C. § 1961 provides as follows; as used in this chapter.

"(i) racketeering activity means (A) any act . . . involving . . . bribery, . . ., which is chargeable under state law and punishable by imprisonment for more than one year; . . .

Title 18 U.S.C. § 1962 provides in pertinent part:

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

18 U.S.C. § 3500(e) (3) reads as follows:

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

**Illinois Statutory Provisions**

Cha. 38, § 33-1, Ill.Rev.Stats. (The Illinois Bribery Statute) provides, in pertinent part as follows:

"a person commits bribery when:

"(d) He receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property of personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, or

"(e) He solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness."

### List of Parties to the Proceeding

The caption of this case in this Court contains the names of all parties.

## STATEMENT OF THE CASE

Both cases Nos. 84-2398 and 85-140, were consolidated sua sponte by the Court of Appeals for the Seventh Circuit. No. 84-2398 was the appeal from the criminal conviction of John M. Murphy. While the appeal was in process and the main brief had been filed John M. Murphy moved through counsel other than trial counsel in the District Court for disqualification of the presiding judge in the criminal trial and for a new trial pursuant to 28 U.S.C. § 455(a), Rule 33 of the Federal Rules of Criminal Procedure and *United States* v. *Ellison,* 557 F.2d 128 (CA-7, 1977) permitting motions for new trial while appeal is pending. This motion was denied and appeal was taken from the denial by separate counsel. After both briefs were filed on behalf of Petitioner, John M. Murphy, the cases were consolidated sua sponte and the opinion and subsequent proceedings carried both docket numbers.

### Nature of the Criminal Proceedings

An original Eight Count Indictment was filed on December 15, 1983. It charged your Petitioner, John M. Murphy, a Judge of the Circuit Court of Cook County, Illinois, with one Count of RICO Bribery (18 U.S.C. § 1962(d), reciting as multiple acts, five occasions when Petitioner was alleged to have received money from Terrence Hake and twice receiving money from David V. Ries to influence the disposition of named cases

pending before him; and seven counts of Hobbs Act Extortion under Color of Official Right (18 U.S.C. § 1951) concerning said cases. Hake and Ries were, and throughout this proceedings acted as, agents of the Federal Bureau of Investigation.

On January 20, 1983, motions were filed to dismiss the indictment for government misconduct; as violative of the Ninth and Tenth Amendments; for want of Federal Jurisdiction; for want of fact allegations to support affect on Interstate Commerce, in predicating a RICO Charge on "official misconduct" (as opposed to bribery).

On March 21, 1984, a superceding Indictment was filed, which indictment added three additional counts of Hobbs Act extortion, altered the original seven occasions except to allege that the money was funneled through named conduits; and an additional charge of bribery was charged relating to influencing disposition of a cause and three instances of obtaining money in connection with the introduction of unrepresented defendants to the Chicago Bar Association designee assigned by that Association to the courtroom for the purpose of discussing the pending charges. These last four charges concern a local lawyer by the name of Arthur Cirignani.[1] Similar motions to dismiss were timely made.

A second superceding indictment was filed on April 18, 1984. This indictment expanded the RICO Bribery allegations to include bribery, "official misconduct", as that term is used in the Illinois Statutes, and further to include Rule 61(12) and 61(16) of the Standards of Judicial Conduct of the Supreme Court of Illinois; modified certain of the Hobbs Act Extortion counts to charge that your Petitioner aided and abetted the receipt of money by others, rather than receiving it personally

[1] "The Bar Association (CBA) maintains a Lawyer Referral Service. This Service screens lawyers and assigns them to branch courtrooms to be of service to unrepresented defendants." (App. A, p. 5)

as earlier charged; and added seventeen counts of mail fraud, concerning the mailing of bond refund checks in cases heard before your Petitioner in 1981 through 1983, pursuant to a charged scheme to defraud the county and its citizens of your Petitioner's loyal and faithful services through acts of bribery, "official misconduct" and violations of the Standards of Judicial Conduct, over a ten year period. Again a motion to dismiss was filed.

A third and final superceding Indictment was filed on May 9, 1984. Dropping one of the aiding and abetting charges, it expanded the RICO count to include a conspiracy to receive money in connection with traffic court cases beginning in 1975. On May 14, 1984, the government filed answers addressed to the motions concerning the original indictment.

On May 29, 1984, your Petitioner moved to dismiss the Third Superceding Indictment on many bases. Ruling was deferred to allow the government to answer. On July 17, your Petitioner's counsel, after trial, asked the Court to require the government to answer. On August 10, 1984, two days after sentencing, the government "Answered" saying "nothing is new".

Trial of the case commenced on May 29, 1984 and on June 14, 1984, the jury returned a verdict of guilty on all counts except three. Post trial motions were all denied.

On August 8, 1984, final judgment was entered against your Petitioner on the verdict.

**Notice of Appeal was Timely Filed on August 15, 1984 (Doc. 104)**

Sentencing (which was advanced on the court's own motion from August 31, 1984) occurred on August 8, 1984. Judge Charles Kocoras was the trial and U. S. Attorney Dan Webb was the chief prosecutor; Matthias Lydon, Edward J. Calihan and Anna R. Lavin were defendant's trial attorneys. (Rec. 119)

**Statement of Facts as Section 455(a) Proceedings**

On February 7, 1985, Petitioner filed a motion before the trial judge for recusal and new trial pursuant to 28 U.S.C. 455(a), Rule 33 of Federal Rules of Criminal Procedure and *U.S. v. Ellison*, 557 Fed.2d 128, based on the alleged existence of a close personal relationship between the trial judge and U. S. Attorney Webb and their having reservations for a vacation together with their families to begin after said trial, which reservations were pending during Petitioner's trial—all of which was not known by Petitioner or disclosed by the trial judge or U. S. Attorney Webb at any time during Petitioner's trial. Petitioner's motion also requested that the trial judge transfer the motion to the Executive Committee for reassignment. Petitioner's motion was supported by this affidavit and those of his trial attorneys. (Rec. 119)

On February 12, 1985, the government filed its answer to petitioner's motion. The answer did not deny any of petitioner's factual allegations, but it admitted the trial judge, U. S. Attorney Webb and Matthias Lydon (one of Petitioner's attorneys) and their families had vacationed together at the same site in 1982. The government's answer otherwise argued that Petitioner's motion should be denied because he had not complied with the criteria required for a new trial based on newly discovered evidence. The government's answer was supported by the affidavit of a U. S. Probation Officer. (Rec. 122)

On February 12, 1985, Petitioner was given leave to file a reply to the government's answer; and, the court acknowledged that Petitioner had requested that his motion be transferred to the Executive Committee. (Rec. 126; App., transcript Feb. 12, government's answer. (Rec. 127)

On March 1, 1985, the trial judge denied Petitioner's motion, without hearing, upon his determination that before his trial Petitioner had had knowledge that he and U. S. Attorney Webb were friends, that Petitioner was not "disquieted" by their friendship, and that Petitioner had been convicted by a jury, which had nothing to do with friendship. (Rec. 128; App., transcript, March 1, 1985, p. 3-6)

On March 8, 1985, Notice of Appeal was filed (Doc. 131, 132)

**Statement of Facts as to Trial**

In respect to the final judgment, which we are here asking this Court to review on Certiorari, vigorous attack was made on the quantity and quality of evidence proposed to supporting the conviction. It is not our intention to ask this Court to make that appraisal in review, nor is it the intention of this Petitioner to argue the indignity of the prosecution that secured this conviction. Rather your Petitioner shall set out the pertinent facts as propounded by the Seventh Circuit in its Opinion:

> "John M. Murphy was an Associate Judge of the Circuit Court of Cook County from 1972 until 1984. He was indicted in 1983 and charged with accepting bribes to fix the outcome of hundreds of cases, from drunk driving to battery to felony theft. Some of the counts on which he was convicted grew out of contrived cases staged by the FBI and federal prosecutors as part of Operation Greylord, an investigation of the Cook County courts." (App. A, p. 1)
>
> * * *
>
> "The testimony at the trial of this case concerned unidentified cases in traffic court [there were no battery or theft cases in traffic court]. But some plays stood out, even though the players were anonymous." (App. A, p. 3, bracketed material ours).

The Opinion then sets forth in dramatic detail the testimony of principally state prosecutors concerning one of these cases (App. A. pp. 3-4). The Court of Appeals found no fault in this type of presentation, nor that the time (and whether limitations was a pertinent factor), place and actors, as well as case identification were neither charged nor supplied.

> "Murphy challenges the admission of several kinds of evidence. Much of the evidence about the traffic court concerns unidentified cases. When James LeFevour was asked by Murphy's counsel to name 'just one' particular case, he said he could not; when asked in what year he handed bribes to Murphy at traffic court, he said 'between '75 and the end of '80.' Murphy's counsel quips: 'Clarence Darrow couldn't defend against that, and he wouldn't have been asked to.'
>
> "The traffic court evidence was pertinent to the RICO conspiracy count. The behavior at traffic court established overt acts of the conspiracy. All of the substantive charges in the indictment charged bribes paid on identified days to identified people during Murphy's years at Branch 29. It is therefore immaterial that Murphy could not defend against a particular allegation of bribery during the traffic court years; he was not on trial for those offenses." (App. A, p. 21)

Your Petitioner submits that conviction on accepting bribes to fix the outcome of drunk driving cases, and the later statement that "he was not on trial for those traffic court cases, and that they established overt acts of the RICO count but could not themselves have been the foundation of a conviction" presents the anomaly of which we complain, and ask this Court to review.

Another area of fact presented by this Petition concerns the grand jury indictment. One James L. LeFevour (a first cousin of the Chief Judge, Richard LeFevour) was the principal —indeed only witness regarding bribery in the Traffic Court. Under his testimony, the cousins were the bribe beneficiaries,

and your Petitioner, Murphy, their charged aider, abettor and (under RICO) their co-conspirator. James LeFevour perhaps proved a hard bargainer in government efforts to secure his testimony against Murphy—and his cousin. So a government agent testified in his stead. This agent, as anonymous as the traffic court recitals, is the only grand jury witness upon whose testimony several alternatives of the RICO charge, and several of the Hobbs Act charges could have been based. The prosecution pleaded no 3500 material on James LeFevour, and refused to produce the grand jury testimony of the anonymous government agent on the ground that it did not qualify as § 3500 material, even though the trial judge interpreted the government's protestations that "it was indicated a special agent testified as to what LeFevour said at some point." (Tr. pp. 445-446). To further complicate this situation, the prosecutors, of record, maintained "He [James LeFevour] was not interviewed previously by the FBI . . . His only interviews were with United States Attorneys." (Tr. 444-445). The defense moved to dismiss the indictment. The Court of Appeals held:

> 3. Although James LeFevour did not testify before the grand jury, an agent of the FBI relayed to the grand jurors who returned a superceding indictment the information to which the prosecutors expected LeFevour to testify. Murphy sought this testimony as a form of substitute Jencks material. But the agent did not testify at trial, and the Jencks Act therefore is inapplicable. It applies only to statements of the 'witness,' § 3500(a), and then only after the witness has testified. There can be no plausible argument that what the agent said is a 'written statement' of James LeFevour, a 'substantial verbatim' report of an oral statement of LeFevour's, or a 'statement. . . if any, made by said witness to a grand jury' (see § 3500(e)(3)).
>
> "4. Murphy replies that if this is so, then the indictment must be void. What else could support the charges? There are two answers. One is that James LeFevour was hardly the only source of evidence against Murphy. The other is that an indictment may be founded

on hearsay—even entirely on hearsay, as in *Costello* v. *United States*, 350 U.S. 359 (1956). '[A]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits.' 350 U.S. at 363 (note omitted). See also *United States* v. *Calandra*, 414 U.S. 338, 344-45 (1974); *United States* v. *Blue*, 384 U.S. 251 (1966); *Lawn* v. *United States*, 355 U.S. 339 (1958)."

* * *

"The conclusion that a court will not inquire into the quality or sufficiency of the evidence underlying the indictment is especially powerful when the review comes after trial. The indictment establishes a prima facie case and marks the battleground for the trial. Once a jury has determined guilt beyond a reasonable doubt, there is no good reason to inquire into the sufficiency of the evidence that went before." (App. A, pp. 18, 19)

Another area of facts concerns the FBI "sting" operation. The Court of Appeals decision says in pertinent part to the issue:

"Murphy attacks the convictions based on the Operation Greylord cases, which he depicts as frauds on the court. You cannot deprive the people of Cook Country of honest services in such 'cases', Murphy maintains, because they are not cases at all. The people had no right to any judicial services, honest or otherwise, in adjudicating put-up jobs, and so lost nothing from his conduct. He analogizes the situation to that of *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), in which the Second Circuit reversed a conviction when the Government had indeed one party to place a phone call for the sole purpose of manufacturing the federal jurisdictional element of the crime."

* * *

"In Operation Greylord agents of the FBI took the stand in the Circuit Court of Cook County and lied about their made-up cases."

* * *

"The agents who made up and testified about the Operation Greylord 'cases' did so without criminal intent. They were decoys, and the Greylord cases made it easier to separate the honest judges from the dishonest ones. It may be necessary to offer bait to trap a criminal. Corrupt judges will take the bait, and honest ones will refuse. Cases are the daily work of courts, just as laws and political deals are the daily work of legislators. In the opportunity suitable to their calling, and here the opportunity was suitable to the judges' calling."

* * *

"The FBI and the prosecutors behaved honorable in establishing and running Operating Greylord[2]." (App. A, pp. 8, 9, 10, & 11).

**Reasons for Granting Writ of Certiorari**

"... Justice must satisfy the appearance of Justice." (*Offutt* v. *United States,* 348 U.S. 11 (1954))

Certiorari be granted here in order:

1) To assure defendant his constitutional right (implemented by 28 U.S.C. 455) to a trial having the appearance of impartiality; and,

2) to conform the 7th Circuit with all the other circuits ruling on the application of that statute which affects *every* Federal Court case and the enforcement of which "is the palladium of our judicial system." (*United States* v. *Columbia Broadcasting System, Inc.,* 497 F.2d 107, 109, 5th Cir., 1974)

3) To correct a circuit court decision which represents an extraordinary departure from the accepted and usual course of appellate review.

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[2] At this point the Court of Appeals favors or flavors its Opinion with some assurances of notice to State officials. This is no part of the record in the case, but a gratuitous assurance made casually by the government brief writer on appeal. A request on Reply that the matter be remanded for test in an adversary climate was ignored.

## I

The Due Process Clause entitles a defendant to trial before an impartial and disinterested tribunal:[3]

> "The neutrality requirement . . . preserves both the appearance and reality of fairness' 'generating the feeling, so important to popular government, that justice has been done' . . . by *ensuring* that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with *assurance* that the arbiter is not predisposed to find against him." (*Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980))

28 U.S.C. 455(a), as well as the Code of Judicial Conduct for United States Judges', implements that Constitutional Guarantee.

The terms are unequivocal:

> "Any judge . . . of the United States *shall* disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned." (Emphasis supplied)

Canon 3C:

> "A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ."

The purpose of focus of Section 455(a) was explained in *Postashnick* v. *Port City Construction Co.*, 609 F.2d 1101 at 1112, (5th Cir., 1980):

> "Clearly, the goal of the judicial disqualification statute is to foster the *appearance* of impartiality . . . *this overriding concern with appearances*, which also pervades the Code of Judicial and the ABA Code of Professional Responsibility, *stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence* . . . As this Court has noted, 'protec-

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[3] Identical disregard of his duty to disqualify himself under 28 U.S.C. § 455(a) by the same trial judge as herein occurred in *United States v. Rovetusso*, 768 F.2d 809. In its affirming opinion the Seventh Circuit did not even address defendants Section 455(a) argument, but merely said it was "without merit". Petition for Certiorari is pending therein. (85- , October term, 1985.)

tion of the integrity and dignity of the judicial process from any *hint or appearance* of bias is the palladium of our judicial system.' . . . any question of a judge's impartiality threatens the purity of the judicial process and its institutions."

"Because *28 U.S.C. 455 (a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice,* a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."

". . . the statute requires a judge to exercise his discretion *in favor of disqualification* if he has any question about the propriety of his sitting in a particular case.

"The use of 'might reasonably be questioned' in Section 455(a) (emphasis added) clearly *mandates* that it would be preferably for a judge to err on the side of caution and disqualify himself in a questionable case." (Emphasis Supplied)

Every other circuit ruling on the issue has expressed that same understanding:

"The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial might reasonably question his impartiality on the basis of all the circumstances.

"The inquiry begins and ends with a determination whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality." *(Rice* v. *McKenzie,* 581 F.2d 1114, 1116 (4th Cir., 1978), emphasis supplied)

". . . *actual bias is not pertinent.* Instead, the mere appearance of a possible lack of impartiality in the mind of the average person on the street is enough to warrant recusal." *(In Re Olson,* 20 B.R. 206, 210; 8th Cir., emphasis supplied)

". . . courts must not only be, but must seem to be, free of bias or prejudice. * * * . . . disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *(In Re United States,* 666 F.2d 690, 694-5; 1st Cir., 1981)

See also: *Home Placement Service* v. *Providence Journal Co.,* 739 F.2d 674; (CA-1, 1984); *United States* v. *Mirkin,* 649 F.2d 78; (CA-1, 1981) *In Re IBM Corp.,* 618 F.2d 923; (CA-2, 1980) *United States* v. *Nobel,* 696 F.2d 231; (CA-3, 1982) *Hall* v. *SBA,* 695 F.2d 175; (CA-4, 1983) *McCuin* v. *Texas Power & Light Co.,* 714 F.2d 1255; (CA-5, 1983); *Roberts* v. *Bailar,* 625 F.2d 125; (CA-6, 1980) *United States* v. *Poludniak,* 657 F.2d 948; (CA-8, 1981); *Wood* v. *McEwen,* 644 F.2d 797; (CA-9, 1981); *United States* v. *Conforte,* 624 F.2d 869; (CA-9, 1980) *United States* v. *Ritter,* 540 F.2d 459; (CA-10, 1976), *United States* v. *Heldt,* 668 F.2d 1238; (D.C. Cir., 1981)

In *previous* cases even the Seventh Circuit has followed that same understanding:

". . .We have read [Section 455(a)] to require recusal whenever there is a 'reasonable basis' for a finding of an 'appearance of partiality,' *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110, 116" (*Pepsisco, Inc.* v. *McMillen,* 764 F. 2d 458 (7th Cir., 1985))

"At issue in a Section 455 charge is the *appearance* of partiality," (*Groves* v. *IBT,* 581 F. 2d 1241, 1248 (7th Cir., 1978); italics in original)

In its opinion here the 7th Circuit found:

"An objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation." (App. A p. 28)

"The Webb-Kocoras vacation plans should have been disclosed." (App. A p. 33)

> "It would be difficult to find a 'waiver' on this record because neither Murphy nor Lydon knew before sentencing of the vacation plans. . . " (App. A. p. 29)

Yet, despite those findings and despite the rulings in *Potashnick, Rice, In re Olson, Home Placement Services* and the 7th Circuit's own holdings in *SCA Services, Groves and Pepsico* —all of which cases were cited to it, the 7th Circuit held that *actual* impropriety or prejudice must be shown by the defendant to warrant relief from violation of Section 455(a) here:

> "Judicial acts taken before the motion may not later be set aside unless *the litigant* shows *actual* impropriety or *actual prejudice; appearance* of impropriety is not enough to poison the prior acts." (App. A p. 33; emphasis supplied)

That holding nullifies the plain language of Section 455(a). It also conflicts with holdings in *all* the other circuits (as well as prior 7th Circuit Decisions) ruling on the issue; and, it defeats Congress' intent in amending that statute[4]. Further, such a holding disregards the duty of the reviewing court, knowing the facts underlying the motion, to determine whether the district court erred in failing *sua sponte* to recognize obvious grounds for recusal under Section 455(a) and to order recusal pursuant thereto. (See *United States* v. *Sibla*, 624 F.2d 864, 867-8; (9th Cir., 1980)

## II

(a) The holding here conflicts with those of every other circuit ruling on the issue and with prior decisions of the Seventh Circuit itself. The opinion is even self-contradictory.

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[4] "The legislative history of Public Law 93-512, which enacted the 1974 revision of Section 455, makes clear a major purpose of amending the statute was to promote public confidence in the judicial system. See 1974 U. S. Code Cong. & Admin. News at 6352. *This purpose is inherent in the substitution of an appearance of bias' test for the 'bias in fact' test which existed under former Section 455.*" (*Margoles* v. *Johns*, 660 F.2d 291, 300; 7th Cir., 1981, emphasis supplied)

The opinion herein initially says: "The inquiry [under Section 455(a)] is entirely objective . . . . and is divorced from questions about actual impropriety." (Opn. p. 26) The opinion then contradicts itself by holding that recusal and remand under Section 455(a) is not required unless *actual* impropriety or *actual* prejudice is shown: "Judicial acts taken before the motion may not later be set aside unless the litigant shows *actual* prejudice; appearance of impropriety is not enough to poison the prior acts." (Opn. p. 33 emphasis supplied)

The error of that contradiction, which nullifies the mandate of Section 455(a), in itself warrants certiorari. Otherwise, the principles of logic and *stare decisis* are also nullified by this opinion.

(b) The opinion erroneously states:

> "In cases decided under Section 455(a) disqualification runs from the time the motion was made or granted. * * * Our research has not turned up any case involving mere appearance of impropriety in which the court set aside decisions that had been taken by the district judge before any party asked for recusal. (Opn. p 30)

However, *Potashnick*, supra, (cited in defendant's briefs) and *Hall v. SBA*, 695 F.2d 175 (cited by the court in its opinion) *both* were cases where, *because of the appearance of partiality* in violation of Section 455(a), the circuit court reversed and remanded though no motion under that statute had been made in the district court.[5]

Reversal and remand was also ordered in a case quite similar to this one: *People v. Jackson*, No. 11956, Calif. Ct. App.

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[5] Likewise, because of appearance of partiality, reversal and remand was similarly ordered in *Fredonia v. Columbia Broadcasting Corp. Inc.*, 569 F.2d 251; *U.S. v. Ferguson* 550 F. Supp. 1260; *U.S. v. Cerrella*, 529 F. Supp. 1376; *Miller Industries v. Caterpillar Tractor Co.*, 516 F. Supp. 84 and *Dobson v. Camden*, 502 F. Supp. 679. In *Dobson*, the court said: "The Court deems it advisable . . . to . . . 'bend over backwards' to eliminate any possible taint on the judicial process." (502 F. Supp. at 681)

3rd. Dist., reported in 32 Cr. L. 2178. There defendant's attorney and the female prosecutor maintained a secret companionship throughout defendant's trial. In reversing and remanding for new trial, the court said:

> "Since the situation created by lack of disclosure defies its quantification, actual prejudice need not be shown."

Here, not only failure of Judge Kocoras to disclose his relationship and planned vacation with the prosecutor, but also his denial of hearing on defendant's motion for recusal, likewise defied quantification of the relationship between him and the prosecutor, U.S. Attorney Webb.[6]

(c) The opinion misinterprets and erroneously fails to follow *Hall v SBA*, supra.

In *Hall* no motion under Section 455(a) was made until *after* judgment—as herein. Therein the 5th Circuit vacated judgment and remanded for new trial before a different court on finding that the continuing participation of a magistrate's law clerk in a case before him in which the clerk's future employers were counsel "gave rise to an appearance of partiality." (695 F. 2d at 179)

Despite that finding the 7th Circuit here said: "We think *Hall* is best understood as a case of actual bias (of the clerk) imputed to the court, not simply as an 'appearance' case." (Opn. p. 30)

The error of that reading of *Hall* is shown not only by the finding in *Hall* of "appearance of partiality," but also by that court's statement: "There is not the slightest hint that [the magistrate] in fact engaged in any improper conduct." (695 F. 2d at 180) Moreover, the preface to its opinion emphasizes that *Hall* was concerned solely with the *appearance* of partiality, not actual bias as the 7th Circuit opinion here claims.

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[6] Surely, the 7th Circuit would have ordered reversal and remand if the gender of either Kocoras or Webb had been different as in *Jackson*. What permissible reason can there be for denying such relief where their gender is the same?

The vice of such misinterpretation of *Hall* is shown by the fact that it is the premise for the 7th Circuit's erroneous determination that there is no precedent for "set[ting] aside decisions . . . taken by the district judge before any party asked for recusal." (Opn. p. 30)

However, correctly read, *Hall* (like *Potashnick, Home Placement* Services and the other cases cited herein) would warrant the 7th Circuit's holding that the *appearance* of Judge Kocoras' partiality here required reversal and remand.

(d) The opinion's holding is based on inapplicable cases:

> ". . . . . appearance of impropriety is not enough to poison the prior acts. See *Margoles* v. *Johns,* 660 F. 291 . . . [and] *Barry* v. *U.S.,* 528 F. 2d 1094, 1100. . .(where the trial is 'impeccably fair and just' an erroneous failure to recuse is harmless error)." (Opn. p. 33)

*Margoles* is not applicable because it was *not* a proceeding under amended Section 455(a). Rather, it was a proceeding under F.R. Civ.P. Rule 60(b) and was decided on the basis of that rule:

> "Section 455 is not the real issue here. * * * even if recusal, not due process, were the issue, and even if the amendment to Section 455 applied, the plaintiff's motion would fail. (660 F. 2d at 296,300)

Likewise, *Barry* v. *U.S.* is inapplicable. Contrary to the opinion's statement here, there was no "erroneous failure to recuse" in *Barry.* Rather, that court specifically found "There was no violation of [Section 455(a)]" (528 F. 2d at 1099) Moreover, there was no determination in *Barry* that an erroneous failure to recuse merely amounted to harmless error. Thus, the 7th Circuit's summarization of *Barry* is inaccurate.

(e) Section 455(a) has uniformly been read as being "mandatory" and "self-enforcing". (*Roberts* v. *Bailar,* 625 F.2d 125; *McCuin* v. *Texas Power & Light Co.,* 714 F.2d 1255;

*Fredonia Broadcasting Corp.* v. *R.C.A.*, 569 F.2d 251; *Idaho* v. *Freeman*, 507 507 F.Supp. 706)

Prior decisions of the 7th Circuit have been to the same effect:

> ". . . the provisions [of Section 455(a)] are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. . . . they impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought." (*SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 117; *Groves* v. *IBT*, 581 F.2d 1241, 1248)

Further emphasizing "self-enforcement" of the statute, in *Groves* the Seventh Circuit said:

> "If required to judges should promptly recuse themselves without leaving the burden to opposing counsel to first raise the issue." (581 F.2d at 1249)

However, in this case the Seventh Circuit has shifted the burden under the statute from the judge to a party:

> "If a defendant wants a judge to stand aside under Section 455(a), *he* must make the appropriate motion." (Opn. p. 32, emphasis supplied)

By so ruling the Seventh Circuit disregards the unequivocal terms of the statute as well as the holdings of all other circuits ruling on the issue (including its own prior decisions). In addition, it thereby penalizes defendant for the *judge's* dereliction. As aptly stated in *Potashnick:*

> "The unfairness and expense which results from disqualification . . . can be avoided . . . only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned." (609 F.2d at 1115)

This case raises a threshold constitutional issue arising in *every* case heard in federal courts: Do the proceedings have the requisite appearance of justice?

Certiorari should be granted here to mandate application of that constitutional guarantee in the 7th Circuit (as it has been in *all* other circuits) by its uniform enforcement of 28 U.S.C. 455(a) as intended by Congress.

Far better that *U.S. v. Murphy* stand with other cases demonstrating this court's commitment to guaranteeing the appearance of justice in federal courts than that it fester in the pack of "certiorari denied" as one more credible cause for eroding public confidence in the integrity of the federal judiciary, particularly in the 7th Circuit.

As said in *Fredonia Broadcasting Corp. v. RCA*, 569 F.2d 251 at 256:

> "Where the appearance of impropriety is established, a taint on the judicial system remains as long as that case has not been reversed and remanded.

**B**

The Seventh Circuit has created a brand new legal concept, the concept that federal agents and prosecutors, not in apprehending and imprisoning criminals but, in nuturing and developing any waiver in resistence to temptation, may engage in "good faith perjury", and that such undertaking is "honorable". (App. A, p. 9-11)

This is not "Abscam", where agents dangled the prize and awaited the fish who might be inclined to reach for it.[7] So far as we know, it's perfectly all right to lie to legislators, and *vice versa*. The Seventh Circuit's attempts to equate "Abscam" and

[7] The concept of a policing agency, and a prosecuting agency playing games with lawmakers, and digging deeply into the pockets of a debt-ridden country to do it, is immoral and unconscionable—no other civilized country has engaged in nor emulated this unworthy practice.

narcotic buys[8] with this case are vacuous. Here we have phony cases fed, under solemn oath, into the processes of State courts, lying agents to proffer and support them, to the orchestration of the federal Justice Department. It is not, unlike *"Abscam"*, all right to call upon whatever God one reveres to assist in the verification of falsehoods. Nor does the Department of Justice's concept of a worthy aim nullify the immorality of engagement of the authority of a Supreme Being, and unwitting co-operation of State functionaries. This Court should exercise its supervisory powers at once to halt the engagement of its inferior Courts, as willing, even commendatory, participants in this nefarious program. If these functionaries can lie on their oath to courts with impunity as long as the Justice Department considers the end a valid one, they can lie to any Court, including this Court, in reliance on their absence of felonious intent, structured as a matter of law by the Seventh Circuit. The Seventh Circuit has awarded *carte blanche*. This must be stopped, and this Court has the sole power to do that.

Notwithstanding the Seventh Circuit's resistance to *United States* v. *Archer,* 486 F.2d 670 (2nd Cir., 1973) as a direct conflict[9], we propose it is a direct circuit conflict. The Second Circuit did "not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to a New York police officers and perjury before New York judges . . . [it] went beyond any proper prosecutorial role and needlessly

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[8] The insistence on emphasizing drug enforcement as an excuse for this case is at best facially appealing. As contraband all such drugs are the property of the United States. We have no argument with agents of the United States using schemes and devises to search out its own property.

[9] *Archer* was not decided on this point, but on the basis of manufactured federal jurisdiction. All of the agent-made counts in this case are manufactured jurisdiction. Interstate impact was founded on purchases of stationery and law books from New York by the FBI (App. A, p. 13)

injected the Federal Government in a matter of state concern". (486 F.2d at p. 672). Noting that it was reversing the convictions on jurisdictional grounds, it did not finally resolve the issue, but expressed the hope that "the lesson of this case may obviate the necessity for such a decision on our own part." (486 F.2d at p. 677). New York was successful. No such scheme was tried again there. It was brought to Chicago.

In *United States* v. *Rosner,* 458 F.2d 1213 (2nd Cir., 1973) that same circuit speaking *in dicta* because the agent involved never broke the law nor committed crimes, called "The use of a dummy defendant, the ultimate in chicanery of unlawful intrusion is . . . [so far beyond the bounds of governmental propriety that it is offensive to a rule of liberty under law]." (485 F.2d at p. 1227).

We believe it to be irrefutable that "the ultimate in chicanery" in New York does not become honorable over the nine hundred miles to Chicago. If it is chicane there, it is chicane here, if it's honorable here, it's honorable there, but conflict cannot be swept under the rug.

We further submit that a federal court should not allow a prosecution where, to prove its case, the government was obliged to lay bare its crimes. *Olmstead* v. *United States,* 277 U.S. 433, 479-480 (1928) Justice Brandeis dissenting. We submit that this Court now has occasion, not available in *Hampton* v. *United States,* 425 U.S. 484 (1976), to confront Government overinvolvement in areas outside the realm of contraband offenses." (425 U.S. at p. 493, concurring opinion.)[10]

## C

This Court should issue its writ to review this decision of the United States Court of Appeals for the Seventh Circuit to preserve the letter, spirit and integrity of the First Clause of the

[10] This statement was made in clear reference to *Archer.*

Fifth Amendment, prohibiting the calling upon any person to answer any charge of felony except upon presentment or indictment of a grand jury. That prohibition cannot be changed, added to or detracted from, except by referendum of the states or of the people. That prohibition was borrowed from English law and incorporated with solemn deliberation into our Bill of Rights as the bulwark between the ambition or vengance of the prosecutor and his target. The legislature cannot change it; the executive cannot change it, this, the highest court in the land cannot change it. But this decision endorses its change by a yoke of lowly federal prosecutors—the very people against whom its protection was provided.

The prosecutors alone, assuming the role of investigators, interviewed the witness. The prosecutors were not satisfied to present the witness to the grand jury, or the witness was not satisfied to go. The prosecutors, as interviewers, prepared some anonymous government agent on what they expect or hope someday that witness will relate. The agent is sworn before the grand jury as the *alter ego* of the witness he has never interviewed, and relates what he has been told by the prosecutors, and indictment follows.

Sometime between then and trial, the prosecutors and the witness reached mutual satisfaction and the witness testified. The Court of Appeals endorsed the procedure on the ground that the quality of the evidence before the grand jury was immaterial once the petit jury had resolved the issues. The defense had no access, under § 3500, to the agent's grand jury testimony because it was not substantially verbatim what the real witness related, though we can assume it was substantially verbatim what the prosecutors said the witness had said.

Your petitioner can cite no conflict between the decisions of this Court nor other circuits. He finds no case where indictment for felony ensued on the information of a prosecutor. Prosecutors' information is restricted to misdeanors.

This decision cannot stand vis-a-vis the Bill of Rights.

## CONCLUSION

WHEREFORE, for the above and foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

Nos. 84-2398 and 85-1401

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

JOHN M. MURPHY,

*Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 979—Charles P. Kocoras, *Judge.*

ARGUED MAY 24, 1985—DECIDED JULY 19, 1985

Before CUDAHY and EASTERBROOK, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* John M. Murphy was an Associate Judge of the Circuit Court of Cook County from 1972 until 1984. He was indicted in 1983 and charged with accepting bribes to fix the outcome of hundreds of cases, from drunk driving to battery to felony theft. Some of the counts on which he was convicted grew out of contrived cases staged by the FBI and federal prosecutors as part of Operation Greylord, an investigation of the Cook County courts.

The charges spanned many years and many statutes. Part I of this opinion sets out the background. Part II addresses Murphy's challenge to Operation Greylord. Part III looks at Murphy's arguments under particular statutes, Part IV at the conduct of the trial, and Part V at the decision of the district judge not to recuse himself.

I

The evidence at trial, which we now view in the light most favorable to the prosecution, showed several categories of cases in which Murphy took bribes. We separate the evidence into several groups: traffic court, "hustling," fixed felony offenses, and the cases that were contrived as part of the investigation. We omit a great deal of the evidence and describe only enough to give the general picture. Some of the events we recount are pertinent to other Greylord cases still in litigation. Our statement of the evidence and the inferences the jury could draw about Murphy's conduct is not meant to prejudge those cases.

*Traffic court.* The Cook County courts are organized into divisions, and supervisory judges assign other judges to particular divisions or courtrooms. From 1972 to early 1981 Murphy was assigned to traffic court, which has courtrooms for major offenses (driving while intoxicated, leaving the scene of an accident, and so on) and minor offenses (such as running a red light). Judge Richard LeFevour was the Supervising Judge of traffic court; he had the authority to decide whether Murphy and other judges would hear major or minor cases.

Officer James LeFevour of the Chicago police, Richard LeFevour's cousin, was assigned to traffic court from 1969 through 1980. James LeFevour testified for the prosecution as part of an agreement under which the Government limited its charges against him to three tax offenses. He testified that beginning in 1975 he met regularly with Melvin Cantor, who would give him a list of his cases that day. James LeFevour would take the list to Judge Richard LeFevour; Judge LeFevour would assign Murphy to hear some of Cantor's cases. James LeFevour would present Murphy the list of Cantor's cases. Murphy then would find the defendants not guilty or sentence them to "supervision," an outcome defendants favored. Later in each day Cantor would give James LeFevour money to pass to Judge LeFevour and some for James to keep for a "tip."

Although Richard LeFevour kept the bribes for these cases, he put Murphy in a position to "earn" his own bribes. Richard LeFevour would assign to major cases, on a regular basis, only those judges who would "see" James LeFevour. Lawyers then would bribe some of the judges assigned to the major courtrooms. Murphy was in a major courtroom more often than most other judges.

Lawyers known as "miracle workers" occasionally met with James LeFevour and with Joseph Trunzo, another police officer assigned to traffic court. The lawyers would tell Officer LeFevour or Officer Trunzo which defendants they represented; the officers would pass the information to Murphy; after the defendant had prevailed, the lawyer would hand an envelope to the officer with $100 per case for Murphy and another $10 or so for the officer; the officer would pass the envelope to Murphy. Prosecutors testified that although they won as many as 90% of their major traffic cases against public defenders, they almost never won a case in which the defendant was represented by one of the "miracle workers."

The testimony at the trial of this case concerned unidentified cases in traffic court. But some plays stood out, even though the players were anonymous. A prosecutor recalled one drunk driving case in which the defendant was represented by Harry Kleper, a miracle worker. The arresting police officer testified that the defendant failed the usual roadside tests of drunkenness and admitted drinking beer before driving. The defendant took the stand and did not deny imbibing; she said only that the liquor did not affect her ability to drive. Under cross-examination she admitted "feeling" the beer; the prosecutor then asked: "And don't you think it is fair to say that you were under the influence of intoxicating liquor?", to which she replied, "Yes, I guess that is a fair thing to say." Judge Murphy threw up his hands and called a recess, turning to Kleper with the remark: "Counselor, I suggest you talk to your client." As Murphy left the bench, the prosecutor heard Murphy yell down the hall to the judges' chambers: "You won't believe this. The State's

Attorney just got the defendant to admit she was drunk." A few minutes later Murphy reconvened the court. Kleper asked the defendant whether she was drunk; she said no. In closing argument the prosecutor stressed the defendant's admission. Kleper did not give a closing argument. Murphy ruled: "I still have a reasonable doubt. Not guilty."

*Hustlers.* In 1981 Judge LeFevour became Presiding Judge for Cook County's First Municipal District court, which has a general jurisdiction. Many of the branch courts had been frequented by "hustlers." "Hustlers" are lawyers who stand outside the courtroom and solicit business from the people about to enter. Ethical rules long have prohibited such solicitation, and every appearance form in Circuit Court contains a representation that solicitation did not occur. Hustling is a profitable business nonetheless, and people find ways to pursue the profits of illegitimate enterprise with the same vigor they devote to lawful activities.

The profit in hustling comes from the bail system in Illinois. A defendant required to post bail may do so by depositing 10% of the bail in cash. If the defendant is discharged, the cash deposit (less the clerk's handling fee) is returned. This payment, called the cash bond refund (CBR), also may be assigned to the defendant's lawyer as compensation for legal services. Assignment requires the approval of the court. Hustlers make their money by persuading defendants to hire them and assign the CBR, then persuading the judge to release the CBR to them.

Judge Thaddeus L. Kowalski, who presided over the court known as Branch 29 from June 1980 to March 1981, believed that hustlers cheated their clients at the same time as they violated ethical rules. Often the hustlers appeared as counsel only when the case was bound to be dismissed anyway, as they well knew. Their "representation" of the defendants simply diverted the CBRs from the defendants to the lawyers. Judge Kowalski addressed hustling in the most effective way—by eliminating its profitability. He refused to permit the hustlers to collect

the CBRs. They soon deserted Branch 29. When Richard LeFevour became the presiding judge of the first district, Judge Kowalski explained to Judge LeFevour how he had cut down on hustling. Judge LeFevour praised Judge Kowalski and promptly transferred him from Branch 29 to the East Chicago Avenue Police Court, which handles criminal cases originating in the Cabrini Green housing project. Judge LeFevour replaced Kowalski with Murphy.

Hustlers flourished under Murphy, who routinely permitted them to collect the CBRs. The hustlers showed appropriate gratitude. Every month the lawyers, collectively known as the Hustlers Club, paid James LeFevour $2500. James kept $500 and gave the rest to Richard. (The sums were reduced for some months when the hustlers' take fell. Murphy was incapacitated by a broken ankle, and his replacement was apparently less compliant.) After a hustler made a certain amount, he paid an additional sum to the judge of the particular court. James LeFevour told Murphy of the Hustlers Club and Richard LeFevour's approval. Murphy told James LeFevour that he approved too.

Although Richard LeFevour kept the principal bribe, there were still rewards for Murphy. As at traffic court, Murphy was free to establish his own stable of bribegivers. The Chicago Bar Association (CBA) maintains a Lawyer Referral Service. This service screens lawyers and assigns them to branch courtrooms to be of service to unrepresented defendants. These lawyers are potential competitors of the hustlers, and Murphy apparently cultivated them as independent sources of revenue.

Arthur Cirignani participated in the CBA's program. (The evidence at trial casts no shadows on the integrity of the CBA itself.) From June 1980 through the end of 1983 he was assigned to a courtroom three to four times a month. Whenever he was assigned to Branch 29, he paid Judge Murphy to assign cases to him rather than to continue the proceedings and allow the hustlers to claim the CBRs. For example, on June 21, 1982, Cirignani

visited Murphy first thing in the morning and informed Murphy that he was there as the bar's lawyer. Murphy referred thirteen cases to Cirignani that day and allowed Cirignani to collect CBRs totalling $1,010, a return Cirignani called "excellent." On June 22 Cirignani took $200 in cash to Murphy, who accepted the money without comment. Cirignani testified that he paid Murphy then and on other occasions to ensure referrals in the future.

*Fixed cases.* Murphy threw business to lawyers; he also threw cases. Cirignani, who testified under an arrangement that he would not be prosecuted if he told the truth, described one such case. Cirignani represented Arthur Best, charged with felony theft. The police had seized evidence from the grounds of Best's house under authority of a warrant, and Cirignani moved to suppress the evidence. On the day of the suppression hearing Cirignani visited Murphy's chambers before court began and while they were alone told Murphy that he had a "good" motion to suppress. Murphy promised to "take a look at it." Judge Murphy later granted the motion to suppress, giving no reasons. The prosecutor then dismissed the case against Best. Before leaving the courthouse Cirignani gave Murphy an envelope containing $300. Cirignani received a CBR of $1800 in the case, and the client also paid $700 directly. (As it turned out, Cirignani's success was short-lived. The Appellate Court of Illinois reversed. *People v. Best*, 97 Ill. App. 3d 1083, 424 N.E.2d 29 (1st Dist. 1981).)

*Greylord cases.* Most of the evidence about fixed cases was presented by witnesses who had concocted the cases for the purpose of the Greylord investigation. Terrence Hake, an agent of the FBI posing as a corrupt lawyer, would represent the defendants in ghost-written cases. Agents would file complaints and testify about made-up events.

In one case two agents of the FBI, posing as "Norman Johnson" and "John Stavros," claimed to have had a violent encounter in which Johnson injured Stavros. Hake represented Johnson, the "defendant." Wearing a tape

recorder, Hake privately visited Judge Murphy's chambers on the morning the case was set for a hearing. He introduced himself as Johnson's lawyer and said he wanted a verdict of not guilty. Murphy replied: "I'll throw the fucker out the window." Hake mentioned dealings with Joseph Trunzo and suggested that Trunzo would make arrangements; Murphy said: "That's okay, everything's alright." Murphy found Johnson not guilty. But things were not well. After the trial Hake gave $300 to Officer Joseph Trunzo ($200 for Murphy, $100 for Joseph and his twin brother Jim). They did not deliver the $200 to Murphy; they apparently planned to fleece Hake (a novice at corruption) by keeping the money, leaving Hake to face an angry judge. Murphy told Hake the following week that he had not seen either Trunzo. A few days later Murphy visited traffic court, still the assignment of both Trunzos, looking for them. Joseph Trunzo then gave Murphy the $200 he had received from Hake, explaining to Murphy that "I got busy and forgot to call you." (In the other trials Joseph Trunzo kept Hake's money and Murphy did not get paid, but so far as the record shows Murphy did not know the money in these cases had been meant for him.)

Hake represented the "defendants" in several other cases fabricated by the FBI. The payoffs went more smoothly. On each occasion the "defendant" was discharged, and Hake paid Officer James LeFevour, apparently a more honest criminal than the brothers Trunzo. James LeFevour passed most of the money to Richard LeFevour and told Murphy that Judge LeFevour wanted verdicts of not guilty. Hake had some additional recorded ex parte conversations with Murphy. In one Hake conceded that his client was guilty but said he needed a verdict of not guilty; Murphy said "it'll be discharged that's all" and later acquitted the "defendant." During another meeting Murphy produced Hake's business card—a card given to James LeFevour on which Hake had written the names of cases he wanted dismissed. David Ries, another attorney and agent of the FBI, described two other concocted cases in which he represented "de-

fendants" and paid a bribe through yet another police officer to obtain the desired disposition. See *United States v. Blackwood*, No. 84-2852 (7th Cir. July 11, 1985), affirming that officer's conviction.

*The outcome.* The jury convicted Murphy on 24 of the 27 counts in the indictment. The counts involved four legal theories. Some counts charged violations of the mail fraud statute, 18 U.S.C. § 1341. The checks constituting the CBRs were mailed to the attorneys, and each mail fraud count was based on the mailing of one CBR. The "fraud" was one committed by Murphy on the people of Cook County, who lost his honest services. Some counts were based on the Hobbs Act, 18 U.S.C. § 1951(a), which prohibits extortion affecting interstate commerce. The extortion lay in the solicitation and receipt of the bribes. Some counts were based on the theory that Murphy aided and abetted others who violated the Hobbs Act. The remaining count was based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), which prohibits the operation of an "enterprise" in interstate commerce through a "pattern" (two or more events) of "racketeering" (the violation of specified state or federal laws). The "enterprise" here was the Cook County Circuit Court.

The district court imposed 24 concurrent sentences. The longest, ten years, are based on the RICO and Hobbs Act counts. The court did not impose a fine or a forfeiture.

## II

Murphy attacks the convictions based on the Operation Greylord cases, which he depicts as frauds on the court. You cannot deprive the people of Cook County of honest services in such "cases," Murphy maintains, because they are not cases at all. The people had no right to any judicial services, honest or otherwise, in adjudicating put-up jobs, and so lost nothing from his conduct. He analogizes the situation to that of *United States v. Archer*,

486 F.2d 670 (2d Cir. 1973), in which the Second Circuit reversed a conviction when the Government had induced one party to place a phone call for the sole purpose of manufacturing the federal jurisdictional element of the crime.

*Archer* is a judicial reaction to activities the court thought overextended federal power. But this case is not *Archer*. The prosecutors did not move a state crime to a federal court by main force. Murphy's complaint is a more traditional objection to creative acts by prosecutors. He contends that there was no crime at all and that if there was a crime the prosecutors manufactured it.

These arguments can be made about any "sting" operation—indeed about any use of undercover agents. The agents who offered bribes to Members of the House and Senate in the "Abscam" sting were not trying to grease the skids for a real project or obtain an actual law. Agents who buy illegal drugs are not going to distribute them for profit. There is no "crime" in these cases, in the sense that the scheme cannot come to fruition, and the evils against which the laws are set cannot occur. Yet courts regularly sustain convictions based on these entrepreneurial efforts. *E.g.*, *United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) (Wood, J.). The law forbids the extortion and the scheme to defraud, not just the completed fraud. *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985); *United States v. Lindsey*, 736 F.2d 433, 436 (7th Cir. 1984); *Jannotti*, *supra*.

In Operation Greylord agents of the FBI took the stand in the Circuit Court of Cook County and lied about their made-up cases. Perjury is a crime, and Murphy tells us that those who commit crimes themselves cannot prosecute others' crimes. But criminal proceedings are not designed to establish the relative equities among police and defendants. In many categories of cases it is necessary for the agents to commit acts that, standing by themselves, are criminal.

Bribery, like a wholesale transaction in drugs, is a secret act. Both parties to the bribe violate the law, just as both parties to the sale of drugs violate the law. It is commonplace for agents to take one side of a transaction in drugs. Because the crime leaves no complaining witness, active participation by the agents may be necessary to establish an effective case. The agents' acts merely *appear* criminal; they are not, because they are performed without the state of mind necessary to support a conviction.

The agents who made up and testified about the Operation Greylord "cases" did so without criminal intent. They were decoys, and the Greylord cases made it easier to separate the honest judges from the dishonest ones. It may be necessary to offer bait to trap a criminal. Corrupt judges will take the bait, and honest ones will refuse. Cases are the daily work of courts, just as laws and political deals are the daily work of legislators. In the Abscam operation, the Government offered legislators an opportunity suitable to their calling, and here the opportunity was suitable to the judges' calling.

True, as Murphy emphasizes, the phantom cases had no decent place in court. But it is no more decent to make up a phantom business deal and offer to bribe a Member of Congress. In the pursuit of crime the Government is not confined to behavior suitable for the drawing room. It may use decoys, *Lewis v. United States*, 385 U.S. 206, 208-09 (1966), and provide the essential tools of the offense, see *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976). The creation of opportunities for crime is nasty but necessary business. See *United States v. Belzer*, 743 F.2d 1213, 1219 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 788 (1985); *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983). The Government offered Murphy opportunities to sell the powers of his office and disgrace himself. He accepted with alacrity.[1]

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[1] Murphy argues fleetingly that he is a victim of selective prosecution. He does not even try to fit his case within the stringent criteria of *Wayte v. United States*, 105 S. Ct. 1524 (1985). The argument is a makeweight.

The FBI and the prosecutors behaved honorably in establishing and running Operation Greylord. They assure us that they notified the Presiding Judge of the Circuit Court's Criminal Division, the State's Attorney of Cook County, the Attorney General of Illinois, and the Governor of Illinois. Such notice may not be necessary, and certainly a criminal defendant is in no position to complain of the absence of such notice (for he has no personal right to protect the dignity of the Cook County courts), but the notice dispells any argument that the federal Government has offended some principle requiring respect of the internal operations of the state courts. The Greylord cases did not interfere with the smooth operation of the local courts or diminish the rights of any third party. They were, in this respect, less offensive than "sting" operations in which the police go into business as a "fence" for stolen goods. The existence of a well-paying fence may induce people to steal goods to sell to the fence. Here no stranger was at risk. Operation Greylord harmed only the corrupt.

## III

Murphy raises six issues concerning the interpretation or application of the statutes under which he was convicted.

1. The mail fraud counts were based on the mailings of the CBRs. Murphy says that these mailings were not part of any fraud committed against the people of Cook County. The CBRs were matters between the clients and the lawyers; he had nothing to do with them. He relies on *United States v. Maze*, 414 U.S. 395 (1974), and *Parr v. United States*, 363 U.S. 370 (1960). In each of these cases the Court held that mailings that merely settle accounts among the victims after the fraud had taken place do not bring the fraud within the mail fraud statute.

The jury was entitled to conclude, however, that the mailings of the CBRs were integral to the offense. Murphy received payoffs. Lawyers paid the bribes in

order to secure their own profits, and those profits came by way of the CBRs. In the morning the lawyers would fix cases (or hustle clients), and Murphy would release the CBRs to the lawyers. In the afternoon the lawyers would pay the judge for services rendered. The next day the process would be repeated. In *Pereira v. United States*, 347 U.S. 1 (1954), a scheme under which the defendant induced his spouse to send money through the mail, the defendant absconded with the loot, which the Court held violated the mail fraud statute. The mails carried the money to be used in the offense. Here it was the anticipation of receiving the CBRs in a given case (and future cases) that both financed the bribes and made the scheme profitable.

It may be that Murphy did not care whether the lawyers picked up checks in person or whether the court sent them out by messenger instead of mail. But the statute does not demand that the mail (as opposed to some other form of delivery) be essential to the offense. It is enough if use of the mail is an ordinary or expectable event in the course of the scheme and the mailings further the scheme. *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980). See also *United States v. Lindsey*, 736 F.2d 433, 437 (7th Cir. 1984); *United States v. Cavale*, 688 F.2d 1098 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982); *United States v. Galloway*, 664 F.2d 161, 163-64 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982). Murphy caused the mailings to occur, which furthered the scheme. See *Lea*, *supra*, 618 F.2d at 430.

Murphy also appears to argue that the mail fraud statute does not apply to a case in which the fraud is deceit that deprives the people of the honest services of public officials. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied sub nom. Kerner v. United States*, 417 U.S. 976 (1974), rejects this argument, and we see no reason to revisit *Isaacs*. See also *United States v. Brack*, 747 F.2d 1142, 1146 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1193 (1985) (mail fraud statute not confined to technical reading of "fraud"); *United States v. Gorny*, 732 F.2d 597, 602 n.2 (7th Cir. 1984).

2. The indictment alleged that Murphy's receipt of bribes was extortion under the Hobbs Act. The instruction told the jury, over Murphy's objection, that receipt of bribes is sufficient to establish the offense. Murphy argues that the Hobbs Act requires solicitation of bribes, not just the receipt of them. But the instruction was in line with the law of this circuit. See, *e.g.*, *United States v. Schmidt*, 760 F.2d 828, 832 (7th Cir. 1985) (collecting cases). Murphy relies on *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc), which he says holds that a demand for payment in exchange for a specific return is an element of every Hobbs Act prosecution. As we explained in *Schmidt*, the holding of *O'Grady* is not so broad. It requires only a misuse of office in exchange for a payoff, not a specific demand for payment on threat of a specific sanction. *O'Grady* would not help Murphy even if this circuit followed that case. The instructions here called for the jury to find misuse of office.

3. The Hobbs Act requires proof of an effect on interstate commerce. The indictment alleged, and the evidence showed, that the bribes paid to Murphy "depleted the assets" of the lawyers who paid them, and that the lawyers regularly purchased items in interstate commerce. The proof at trial showed, for example, that Arthur Cirignani's law firm regularly purchased law books from out of state. Terrence Hake purchased envelopes and stationery from New York. This and other evidence showed a regular connection between the lawyers and interstate commerce. Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-86 (1975). The evidence is thin, and as an original matter we might be inclined to doubt that the "depletion" of the lawyers' assets had much effect on commerce. The commerce power of Congress is sweeping, however, and this court has held that Congress meant to exercise that power to the limit. *United States v. Staszcuk*, 517 F.2d 53, 58-59 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). The statute reaches those who affect commerce "in any degree," and in a complex economy almost any movement of funds affects commerce to some degree.

The commerce power reaches everything related to commerce, even though particular instances of a class of activities do not themselves occur in or affect commerce. *Perez v. United States*, 402 U.S. 146 (1971); cf. *Russell v. United States*, 105 S. Ct. 2455 (1985). We have therefore sustained prosecutions based on the "depletion of assets" theory, at least when the assets depleted are those of a business. See *e.g.*, *United States v. Boulahanis*, 677 F.2d 586, 589-90 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *United States v. Blakey*, 607 F.2d 779, 784 (7th Cir. 1979). See also *United States v. Curcio*, 759 F.2d 237, 241-42 (2d Cir. 1985); *United States v. Rindone*, 631 F.2d 491, 493-94 (7th Cir. 1980). The lawyers and law firms here are businesses. The evidence establishing the interstate commerce element of the Hobbs Act offense is skimpy, but even a small effect touches commerce "in any degree" and so is adequate under these cases.

4. It is easier to establish the commerce element of the RICO count. Only the "enterprise" need affect commerce. *United States v. Dickens*, 695 F.2d 765, 781 (3d Cir.), *cert. denied*, 460 U.S. 1092 (1983). Cf. *United States v. McManigal*, 708 F.2d 276, 283 (7th Cir.), *vacated on other grounds*, 104 S. Ct. 419 (1983) (sufficient if the clients of the enterprise "do interstate business"). The "enterprise" here was the Circuit Court of Cook County. See *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981) (a county sheriff's office may be an enterprise under RICO). Without question the evidence showed that the Circuit Court affected commerce—in what it bought in order to operate, in its effect on the lawyers and litigants who appeared before it. If the enterprise of being a real estate broker affects commerce because clients may move from state to state, see *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), then the enterprise of being a large metropolitan court does so.

5. RICO makes unlawful the participation in a "pattern" of "racketeering activity" conducted through an "enterprise." "Racketeering activity" includes "any act or threat involving . . . bribery . . . which is chargeable un-

der State law and punishable by imprisonment for more than one year" (18 U.S.C. § 1961(1)(A)). The RICO count in this case alleged that Murphy conspired with others to violate RICO and committed 13 identified violations of Ill. Rev. Stat., ch. 38, §§ 33-1 and 33-3(d), which make bribery punishable by imprisonment for more than one year. Murphy argues that the indictment is defective because it does not show that he has been convicted of these violations of state law. But RICO does not require conviction; it requires only that the act be "chargeable"—that is, that the predicate act be a criminal rather than civil offense. The Supreme Court held in *Sedima, S.P.R.L. v. Imrex Co.*, 53 U.S.L.W. 5034, 5036 (U.S. July 1, 1985), that the statute does not require a prior conviction. *Sedima* disposes of Murphy's argument.

6. Three counts of the indictment alleged that Murphy aided and abetted James LeFevour "and another judge" (obviously Richard LeFevour) to obtain extortionate payments. Murphy asked for, and the district court refused to give, an instruction that the jury could not convict him of aiding and abetting if it believed that the LeFevours were "incapable of committing the charged acts." There can be no aiding and abetting without an underlying offense. But Murphy never offered the district court a theory under which the LeFevours might be "incapable" of committing the offense of extortion. At oral argument counsel for Murphy elaborated by saying that someone needed to defend Richard LeFevour's interests, and the instruction would have helped. The argument, in other words, is that charges of aiding and abetting ought to be tried at the same time as the charges against the principals.

There is no such rule of mandatory joinder. To the contrary, it is possible to convict a person of aiding and abetting even after the principal has been tried and acquitted. *Standefer v. United States*, 447 U.S. 10 (1980). The district court properly charged the jury that it could convict only if it first determined that there was an underlying offense and that Murphy aided and abetted the offenders. Murphy was entitled to no more.

## IV

This was a long and complicated trial. Like many another long and complicated trial, it has produced a volume of claims of error. None of the claims is persuasive.

1. Several of the witnesses for the prosecution —particularly James LeFevour and Arthur Cirignani —had arrangements reducing their exposure to criminal liability. The Government undertook to prosecute LeFevour only on three tax counts; it promised not to prosecute Cirignani at all if he cooperated fully and told the truth. These arrangements were disclosed on the record, as *Giglio v. United States*, 405 U.S. 150 (1972), requires. Murphy nonetheless maintains that the testimony should not have been admitted, because the prosecution did not grant these witnesses immunity under 18 U.S.C. §§ 6002 and 6003, or at least should have been the subject of an instruction to the jury that "informal immunity" is unlawful.

Murphy misunderstands the function of immunity. The self-incrimination clause of the fifth amendment provides that no person may be compelled to be a witness against himself in a criminal case. If the answer to a question tends to incriminate a witness, that person has a privilege not to reply. Immunity from prosecution under §§ 6002 and 6003 removes the possibility of punishment on account of truthful testimony; with the possibility of incrimination removed, the privilege vanishes. *Kastigar v. United States*, 406 U.S. 441 (1972). If the prosecutor wants to *compel* a witness to testify, he must use §§ 6002 and 6003. *United States v. Doe*, 104 S. Ct. 1237, 1243-44 (1984); cf. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983).

Nothing requires a witness to assert the privilege, however. The witness may surrender the privilege even by neglecting to invoke it, see *Garner v. United States*, 424 U.S. 648 (1976). Because the privilege bars only testimonial compulsion, voluntary arrangements that produce testimony are permissible. A witness may agree to testify on any terms satisfactory to himself. If James LeFevour

or Arthur Cirignani had invoked the privilege, the United States could have overcome the claim only by resorting to formal immunity. But Murphy could not compel either witness to assert the privilege, and therefore he has no complaint when they decide to testify in exchange for less formal protection from prosecution. See *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985) (witness may testify even under a contingent immunity). Because Murphy has no interest in the degree of assurance the witnesses received, there was no reason for the judge to instruct the jury (as Murphy had requested) on the difference between formal and informal assurances of immunity. The jury was entitled to know what assurances the witnesses received, but it need not be told the fine-spun legal distinctions underlying different kinds of assurances.

2. James LeFevour did not testify before the grand jury that indicted Murphy. Indeed, according to the prosecutors he did not begin to cooperate until several weeks before the start of Murphy's trial. He was interviewed only by prosecutors, and their notes of the interviews are not "substantially verbatim" statements of LeFevour. The Government therefore informed Murphy that it had no materials meeting the requirements of the Jencks Act, 18 U.S.C. § 3500. (Nonetheless, three weeks before trial the Government gave Murphy a letter outlining the expected contents of James LeFevour's testimony. This averted surprise at trial.)

Murphy does not say that the prosecution neglected to turn over any "written statement" or "substantially verbatim recital of an oral statement," the key phrases in the Jencks Act. See 18 U.S.C. § 3500(e)(1) and (2). He apparently maintains that the prosecution was required to create Jencks material for the defense to use. We know of no support for imposing such an obligation on the prosecution. The Jencks Act allows the defendant access to the same statements the prosecutor has. If there are no such statements, there are no such statements. The prosecution does not have an obligation to generate statements merely because the defendants would like to have them.

*United States v. Flomenhoft*, 714 F.2d 708, 713 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984).

3. Although James LeFevour did not testify before the grand jury, an agent of the FBI relayed to the grand jurors who returned a superceding indictment the information to which the prosecutors expected LeFevour to testify. Murphy sought this testimony as a form of substitute Jencks material. But the agent did not testify at trial, and the Jencks Act therefore is inapplicable. It applies only to statements of the "witness," § 3500(a), and then only after the witness has testified. There can be no plausible argument that what the agent said is a "written statement" of James LeFevour, a "substantial verbatim" report of an oral statement of LeFevour's, or a "statement . . . if any, made by said witness to a grand jury" (see § 3500(e)(3)).

4. Murphy replies that if this is so, then the indictment must be void. What else could support the charges? There are two answers. One is that James LeFevour was hardly the only source of evidence against Murphy. The other is that an indictment may be founded on hearsay—even entirely on hearsay, as in *Costello v. United States*, 350 U.S. 359 (1956). "[A]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." 350 U.S. at 363 (note omitted). See also *United States v. Calandra*, 414 U.S. 338, 344-45 (1974); *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 339 (1958).

We recognize that some of the lower courts have balked at the result of this line of cases. In *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), for example, the court dismissed an indictment supported only by hearsay when the witnesses misled the grand jury about the quality of the evidence it was hearing. *United States v. Mechanik*, 756 F.2d 994 (4th Cir. 1985) (en banc), *cert. granted*, 53 U.S.L.W. 3881 (U.S. June 17, 1985), establishes a rule of per se reversal for certain procedural violations

occurring before the grand jury. Other cases are summarized in Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 15.4(b) (1985). The foundation of these cases is shaky at best in light of the Supreme Court's decisions, as the grant of review in *Mechanik* may suggest. The Court expressed concern in *Costello* and *Calandra* that challenges to the sufficiency of the evidence and other process before the grand jury would greatly slow down criminal litigation, to the detriment of the public's interest in expeditious resolution of criminal charges. Cases inquiring into the procedures before the grand jury may have had just that effect in some courts. But however that may be, Murphy does not argue that the prosecution misled the grand jury about the quality of the evidence it was hearing.

The conclusion that a court will not inquire into the quality or sufficiency of the evidence underlying the indictment is especially powerful when the review comes after trial. The indictment establishes a prima facie case and marks the battleground for the trial. Once a jury has determined guilt beyond a reasonable doubt, there is no good reason to inquire into the sufficiency of the evidence that went before. We know that the defendant has not been required needlessly to bear the expense and embarrassment of trial. "Any possible prejudice to the defendant . . . disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt." *Rose v. Mitchell*, 443 U.S. 545, 575 (1979) (Stewart, J., concurring).[2] This post-trial challenge to the suffi-

[2] The majority in *Rose* held that when the indictment is returned by a racially biased grand jury, the indictment must be dismissed. It did this because "discrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system and our society as a whole." 443 U.S. at 556. In other words, although for the reasons explained by Justice Stewart an error at the grand jury stage does not harm a particular defendant once he has been

(Footnote continued on following page)

ciency of the evidence supporting the indictment asks us to undertake an entirely pointless inquiry. We decline.

5. Judge Thaddeus Kowalski testified, as we recounted in Part I, that he tried to put a stop to hustling at Branch 29. His reward was a transfer to a lesser court and replacement by Murphy. During the final argument the U.S. Attorney stated: "Judge Kowalski said that [he was transferred for resisting hustling]—what motivation would Judge Kowalski have to come in here and lie? He is testifying about a fellow judge. Why would he come in here and lie unless the point is that he came in here because he had relevant information? He was subpoenaed to testify and he told the truth."

The last sentence of this statement was inappropriate. A prosecutor may not vouch for the honesty of a witness. *United States v. Young*, 105 S. Ct. 1038 (1985); ABA Code of Professional Responsibility, DR 7-106(C)(3) and (4). Murphy's counsel did not object to this statement, however, and we doubt that the court's failure to give a cautionary instruction on its own motion can be deemed "plain error" under Fed. R. Crim. P. 52(b). See *United States v. Young, supra*, 105 S. Ct. at 1046-47. Any error, moreover, was harmless. The U.S. Attorney did not argue the point at length or imply that he possessed additional evidence not before the jury. Kowalski was a peripheral figure in a lengthy trial. This error did not "affect substantial rights" and therefore "shall be disregarded." Fed. R. Crim. P. 52(a). See *United States v. Young, supra; United States v. Hasting*, 461 U.S. 499 (1983).

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[2] *continued*

convicted at trial, it is sometimes necessary to allow a defendant to vindicate broader social interests. There is no similarly broad social interest in preventing the use of hearsay evidence before grand juries. Cf. *Hillery v. Pulley*, 733 F.2d 644 (9th Cir. 1984), *cert. granted sub nom. Vasquez v. Hillery*, 105 S. Ct. 1390 (1985), which presents another aspect of the issue in *Rose*.

6. Murphy challenges the admission of several kinds of evidence. Much of the evidence about the traffic court concerns unidentified cases. When James LeFevour was asked by Murphy's counsel to name "just one" particular case, he said he could not; when asked in what year he handed bribes to Murphy at traffic court, he said "between '75 and the end of '80." Murphy's counsel quips: "Clarence Darrow couldn't defend against that, and he wouldn't have been asked to."

The traffic court evidence was pertinent to the RICO conspiracy count. The behavior at traffic court established overt acts of the conspiracy. All of the substantive charges in the indictment charged bribes paid on identified days to identified people during Murphy's years at Branch 29. It is therefore immaterial that Murphy could not defend against a particular allegation of bribery during the traffic court years; he was not on trial for those offenses. It was permissible for the Government to introduce evidence tending to establish the existence of the RICO offense, even though none of the traffic court evidence itself could have been the foundation of a conviction. See *United States v. Angelilli*, 660 F.2d 23, 39-40 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). The evidence was certainly relevant under Fed. R. Evid. 401. Murphy does not say that he had trouble telling one bribe from another; he denies that he took even one. The imprecision in James LeFevour's recall of dates and cases therefore worked to Murphy's advantage by weakening the prosecution's case without undercutting his own.

Several witnesses testified that Murphy had a reputation for dishonesty. This was permissible. Murphy's character and reputation were in controversy in this case. He put on a parade of character witnesses, and the prosecution was entitled to counter that evidence. Fed. R. Evid. 404(a)(1), 405(a). The prosecutor's right to introduce particular acts to show a common plan and absence of mistake—Murphy denied that the money was for bribes, if it was received at all—also supports the "anonymous case" evidence. Fed. R. Evid. 404(b). Surely it is

significant that Murphy had been receiving envelopes full of cash month after month for eight years; a jury was entitled to infer that these envelopes were payments for *something*.

The participants in conversations in Judge Murphy's chambers often commented on how they interpreted his remarks. For example, Cirignani testified that when he visited Murphy's chambers to discuss the motion for suppression of evidence in *People v. Best* and told Judge Murphy that he wanted the Judge to grant the motion, Murphy replied: "I'll take a look at it." Cirignani testified over objection that he interpreted this remark "to mean that he would, in fact, suppress the evidence and rule in my favor." This evidence was relevant; the Hobbs Act requires a showing that the victim paid money because of the other party's official position. The prosecutor needed to show that Cirignani paid because Murphy was willing to alter his official acts. Cirignani was an experienced participant in the process, and the jury was entitled to hear his deductions about what signals had been sent and received. Bribes can be arranged in code and with body movements; even grizzled participants may be cagy. Cirignani's testimony about the meaning of a conversation among business partners was admissible. *United States v. Craig*, 573 F.2d 513, 520 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978).

7. Despite Murphy's protests, the district judge conducted the conference about the instructions to the jury in his chambers and off the record. The conference lasted some five hours. Counsel maintain that they could not adequately remember what happened in order to preserve their objections. Murphy argues that the unrecorded conference violated 28 U.S.C. § 753(b), which says that "[e]very session of the court and every other proceeding designated by rule or order of the court . . . shall be recorded verbatim . . . ." But Murphy overlooks the rest of the section: "Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court . . . ." The statute does not require the conference on jury instructions to be held in open court.

Criminal trials are formal proceedings. The formality is important. It preserves regularity; it protects the dignity and orderliness of what could otherwise deteriorate in light of the nature of the charges and the low-life status of many defendants and witnesses. The requirement that most of what happens happen in open court also is important. The jury must hear what transpires. The defendant is entitled under the Sixth Amendment to be present and have a public trial, and the public has rights under the First. Yet not everything requires the same degree of formality. The jury is supposed not to hear the debates about the instructions. Both defendant and the public will learn how things came out no later than the jury does. The defendant may have a right to attend the conference in chambers or in court. A district judge is entitled to conclude that a long and complex trial such as this one has formality enough, and that both the judge and the lawyers would benefit from the lower level of tension that flows from holding a conference in chambers without official recording.

The Fifth Circuit has held that a judge may elect to have the instruction conference in chambers without a court reporter, if the local rules so permit. *United States v. Jenkins*, 442 F.2d 429, 438 (5th Cir. 1971). We concur. At the conclusion of the conference the judge must make formal rulings on the record and offer counsel an opportunity to make their objections known. The court did so here, and this is sufficient to protect the rights of the accused.

It is possible that this procedure could injure the defense if it obscured the nature of the objections made and reasons for giving the instructions. For example, the defendant might have proposed in writing an incorrect instruction and then modified the proposal orally during the conference. If the judge refused to give the instruction, it may be difficult to tell what modifications were proposed and whether the instruction, as modified, would have been appropriate. We therefore think it necessary for an appellate court, when reviewing a trial in which the

instruction conference was not transcribed, to indulge all reasonable inferences favorable to the defendant.

We have done so in this case. We considered in Part III all of Murphy's statutory arguments, despite the Government's contentions that some of Murphy's own draft instructions were flawed and his objections imperfect. We should greatly regret it if some day it is necessary to set aside a conviction because we cannot tell whether objections were adequately preserved and must indulge inferences. But we see no adequate reason to command recordation in every case and no other way to proceed if we do not.

8. There are a few more arguments to consider, but most concern the scope of cross-examination allowed to defense counsel. The district court cut off inquiry into Greylord matters other than the five cases presented at this trial. The management of cross-examination is peculiarly committed to the district court's discretion, *United States v. Muelbl*, 739 F.2d 1175, 1184-85 (7th Cir.), *cert. denied*, 105 S. Ct. 388 (1984), and the court did not abuse that discretion in declining to allow defense counsel to wander afield.

All told, this case was well tried by counsel and well handled by the court. No case of this complexity will be without flaw. This one came reasonably close.

## V

This leaves for consideration the most difficult and troubling question: whether the district judge was required to recuse himself.

The principal lawyer for the United States at trial was Dan K. Webb, then the U.S. Attorney. Webb and Judge Kocoras are the best of friends. They met when both were Assistant United States Attorneys in Chicago between 1971 and 1975. Judge Kocoras stated that "our professional relationship developed into a social friendship as well." Immediately after Judge Kocoras sentenced

Murphy on August 8, 1984, Judge Kocoras, Dan Webb, and the Kocoras and Webb families repaired to the Calloway Gardens Resort, Pine Mountain, Georgia. They resided there in adjoining cottages. The trip had been planned before the trial, and Judge Kocoras advanced the date of sentencing so that he could wrap up the Murphy case before going on vacation with the Webb family. This was not an isolated event. The Webbs and Kocorases had vacationed together at Calloway Gardens in 1982.

Counsel for Murphy learned of the 1984 vacation for the first time after Judge Kocoras had sentenced Murphy. In February 1985 counsel filed a motion seeking Judge Kocoras's recusal under 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." See also Canon 3(C)(1) of the Code of Judicial Conduct. Judge Kocoras denied the motion.

Neither the close friendship between Kocoras and Webb nor either of the vacations was disclosed on the record. Yet the statute places on the judge a personal duty to disclose on the record any circumstances that may give rise to a reasonable question about his impartiality. Although a judge may accept a waiver of disqualification under § 455(a), the "waiver may be accepted [only if] it is preceded by a full disclosure on the record of the basis of the disqualification." 28 U.S.C. § 455(e).

Murphy contends that the vacation plans give rise to a reasonable question about any judge's ability to remain impartial. No one doubts that Judge Kocoras was in fact impartial; his reputation for integrity and impartiality is outstanding. Yet the statutory test is not actual impartiality but the existence of a reasonable question about impartiality. When a question arises about friendship between a judge and a lawyer, "[t]he twofold test is whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the relationship is disregarded." Advisory Opinion No. 11, Interim Advisory Committee on Judicial Activities (1970).

The statutory standard puts to the judge a question about the objective state of the legal and lay culture. The court must consider whether an astute observer in either culture would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized. The inquiry is entirely objective, see *Pepsico, Inc. v. McMillen*, No. 85-1932 (7th Cir. June 6, 1985), slip op. 4-5, and is divorced from questions about actual impropriety.

The existence of a "reasonable question" varies from time to time as ordinary conduct of lawyers and judges changes. When John Marshall was the Chief Justice, the Justices and many of the lawyers who practiced in the Supreme Court lived in the same boarding house and took their meals together. Washington, D.C., was still a small town and neither justices nor counsel lived there year-round. See G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 Va. L. Rev. 1 (1984). It is accepted today for a judge in the United Kingdom to hear a case in which his sibling or child is an advocate. The ordinary standards of conduct of the legal profession reflect judgments about the likelihood of actual impropriety in a particular case. Unless the conduct is substantially out of the ordinary, it is unnecessary to pursue the further question whether the conduct presents the appearance of impropriety—although it is always possible to inquire into actual impropriety no matter how common the conduct may be.

In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discarding one's friends or risking

disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer. *E.g., In re United States*, 666 F.2d 690 (1st Cir. 1981); *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975) (en banc). Cf. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir.), *cert. denied*, 104 S. Ct. 529 (1983).

These cases also suggest, however, that when the association exceeds "what might reasonably be expected" in light of the associational activities of an ordinary judge (*Parrish*, *supra*, 524 F.2d at 104), the unusual aspects of a social relation may give rise to a reasonable question about the judge's impartiality. The relation between Judge Kocoras and U.S. Attorney Webb was unusual. These close friends had made arrangements before the trial began to go off to a vacation hideaway immediately after sentencing.

Most people would be greatly surprised to learn that the judge and the prosecutor in a trial of political corruption had secret plans to take a joint vacation immediately after trial. An objective observer "might wonder whether the judge could decide the case with the requisite aloofness and disinterest" (*Pepsico*, *supra*, slip op. 5). The test for an appearance of partiality in this circuit is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case" (*id.* at 4). That hypothetical observer would be troubled by what happened in this case.

This is not an occasion on which to lay down rules for the permissible extent of social ties between judge and counsel. Social relations take so many forms that it would be imprudent to gauge all by a single test. We decide only the case before us. But with appreciation for both the difficulty of deciding how much is too much, and deference to the contrary judgment of a careful and upright judge, we conclude that an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the

prosecutor that the families of both were just about to take a joint vacation. A social relation of this sort implies extensive personal contacts between judge and prosecutor, perhaps a special willingness of the judge to accept and rely on the prosecutor's representations. The U.S. Attorney lays his own prestige, and that of his office, on the line in a special way when he elects to try a case himself. By acting as trial counsel he indicates the importance of the case and of a conviction, along with his belief in the strength of the Government's case. It is a particular blow for the U.S. Attorney personally to try a highly visible case such as this and lose. A judge could be concerned about handing his friend a galling defeat on the eve of a joint vacation. A defendant especially might perceive partiality on learning of such close ties between prosecutor and judge.

Yet this conclusion does not lead to a decision in Murphy's favor. Although perhaps 999 of 1000 observers would have been stunned to discover that judge and prosecutor were about to go on a joint vacation, the remaining one of the thousand was on Murphy's defense team. Matthias Lydon, the principal trial lawyer for Murphy, had been in the U.S. Attorney's office at the same time as Dan Webb and Judge Kocoras. Lyndon and Webb later were partners in private practice. All three were friends and remained so. Judge Kocoras stated that "my professional relationship with [Lydon] developed into a social friendship as well, and no less than that with Mr. Webb. Those friendships developed [at the U.S. Attorney's office] and continue to the present day." The vacation at Calloway Gardens Resort in 1982 had included Lydon and his family as well as the Webb and Kocoras families. Although Lydon has filed an affidavit stating that he did not know of the plans for the 1984 vacation, he admitted that he knew of the close relation between Webb and Kocoras and did not deny the probability of future vacations at what is apparently the favorite resort of former members of the U.S. Attorney's office in Chicago. Murphy himself filed an affidavit conceding that he knew

that Lydon, Webb, and Judge Kocoras are close friends, although Murphy denied knowledge of both vacations.

Lydon's friendship with Judge Kocoras removes some of the sting from the revelation about the vacation plans of the judge and the prosecutor. The defense camp's knowledge did not abrogate any obligation to spread the information on the record and seek Murphy's consent to his participation in the case, however. Section 455(e) requires waiver on the record, not waiver by implication. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1114 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). This court said in *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (7th Cir. 1977), that there is no time limit on a motion for recusal. The principal disqualification statute in effect before § 455 was amended in 1974 had contained a time limit for motions, and the Department of Justice asked Congress to put such a limit in the new § 455 as well. Congress did not, and the court concluded in *Morgan* that this implies the absence of a time limit.

Our decision stands alone, however. The Fifth Circuit has called the discussion in *Morgan* dicta and rejected the conclusion on the merits, reasoning that Congress did not put a time limit in § 455 because time limits were already so firmly fixed in both statute and common law that there was no need to add another. *Delesdernier v. Porterie*, 666 F.2d 116, 120-23 & n.3 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982). See also *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 729 (1984); *United States v. Nobel*, 696 F.2d 231 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982); Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236, 263-64 (1978).

We need not decide whether to reconsider *Morgan* in light of *Delesdernier* and the cases that have followed *Delesdernier*. It would be difficult to find a "waiver" on this record because neither Murphy nor Lydon knew before sentencing of the vacation plans the only source of

the appearance of impropriety. We believe, however, that the absence of a waiver is not dispositive. The question here is not really whether Judge Kocoras was required to recuse himself when Murphy filed his motion. Judge Kocoras already had imposed sentence; there were no further proceedings from which Judge Kocoras could be recused. What Murphy wants is not recusal from future proceedings but the nullification of everything that went before. We conclude that this is not the appropriate consequence of a recusal for appearance of impropriety.

In cases decided under § 455(a), disqualification runs from the time the motion was made or granted. In *Pepsico*, our most recent case under § 455(a), the court ordered the district judge to stand aside from the time a party filed the motion for recusal; we did not vacate all of the judge's earlier orders and require the new judge to start afresh. Our research has not turned up any case involving mere appearance of impropriety in which the court set aside decisions that had been taken by the district judge before any party asked for recusal.[3]

The statute requiring recusal when the judge's impartiality might reasonably be questioned vindicates interests of the judicial system as a whole. It is important to the administration of justice that judges both be and appear to be impartial. When a question about impartiality reasonably arises, the judge must stand aside in order to preserve public confidence in the courts. But this does not imply that a judge who is a close friend of counsel will provide an unjust disposition; if it implied that, the question would be one of actual impropriety rather than

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[3] *Hall v. SBA*, 695 F.2d 175 (5th Cir. 1983), comes the closest. In *Hall* a magistrate's law clerk accepted employment with the plaintiff's law firm and thereafter worked on the magistrate's opinion. The clerk also had been a member of the plaintiff class. The court thought this required the magistrate's opinion to be set aside, although no motion was made until after the opinion was released. We think that *Hall* is best understood as a case of actual bias (of the clerk) imputed to the court, not simply as an "appearance" case.

the "appearance" of impropriety. No one thinks that Chief Justice Marshall acted with actual impropriety when he heard arguments from lawyers with whom he shared a boarding house. The rule of § 455(a) is designed to put an extra measure of safety into the system. When that extra measure fails, the result is regrettable, and the judicial system as a whole suffers, but this does not mean that the parties actually received an unjust trial.

The waiver provision of § 455(e), which applies to the "appearance" of impropriety issues under § 455(a) but not to any actual conflict of interest under § 455(b), reinforces our conclusion that § 455(a) is concerned with perceptions rather than actual defects in the administration of justice. Under § 455(a) and (e) a party may stand on his right to a judge about whom no reasonable question may be asked; yet the possibility of waiver implies that the judge can provide a fair trial even if such questions may be asked. Section 455(e) gives a party an absolute right to remove a judge (by declining to waive), but it necessarily implies that conduct after a waiver (and therefore before one, too) does not automatically deprive the party of substantial *personal* rights. The many cases in other circuits holding that "appearance" questions are waived if not timely asserted—so the judge may continue to sit even *after* the motion—also show that appearance of impropriety does not undercut personal rights. And unless an error affects substantial rights, it is not a basis of reversal. 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a).

It is important in criminal cases especially to induce defendants to present their claims in a timely fashion. A battery of rules—from contemporaneous objection rules to forfeiture rules such as Fed. R. Crim. P. 12(f)—requires defendants to present claims while there is still time to eliminate the problem and avoid a needless trial. If they fail to do so, the claim is forfeit. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Davis v. United States*, 411 U.S. 233 (1973). Forfeiture may occur even in the absence of an explicit time limitation if the right is knowable in advance and exercise of the right would prevent repetitious litigation.

*Francis v. Henderson*, 425 U.S. 536 (1976); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1254-59 (1977). Only if the accused could not have known of the right, see *Reed v. Ross*, 104 S. Ct. 2901 (1984), or some other "cause" impedes a defendant from standing on his rights, see *Riner v. Owens*, No. 83-1627 (7th Cir. June 14, 1985), will a court permit the defendant to have two trials when a timely assertion of the right would have held the number to one.

Certainly a request for recusal before trial would have avoided any possibility of retrial. Murphy might have given a formal waiver on the record; Judge Kocoras might have recused himself; U.S. Attorney Webb might have stepped aside and allowed the case to be tried by a member of his office. Murphy had all the information he needed to initiate inquiry. Although according to the affidavits of Lydon and Murphy the defense camp did not know of the vacation plans for 1984, Lydon knew of the actual vacation in 1982, and Murphy knew of the longstanding friendship among Lydon, Webb, and Judge Kocoras. This was more than enough to put a reasonable person on notice of the potential gains from further inquiry. The defense camp elected not to make any further inquiry, perhaps believing that an ethical judge such as Judge Kocoras would bend over backward to avoid favoring the prosecutor in such a case and that the defense therefore had more to gain from the Kocoras-Lydon friendship than it had to lose from the Kocoras-Webb friendship. The defendant is bound by a tactical choice such as this may have been, whether or not he participated personally in that choice. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); cf. *Wainwright v. Sykes* and other forfeiture cases.

Ultimately, however, we do not rest on the fact that Lydon, Webb, and Judge Kocoras went on vacation together in 1982. A detailed inquiry into what the defense camp knew and when is not essential when the motion under § 455(a) is filed as late as this was. A criminal trial

is too serious and too costly to permit a defendant to sit on possible errors, hoping to have a crack at an acquittal (or low sentence) and then still a second trial. If a defendant wants a judge to stand aside under § 455(a), he must make the appropriate motion. Judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts. See *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (appearance of impropriety, and perhaps even actual impropriety, may not be raised for the first time on collateral attack); *Barry v. United States*, 528 F.2d 1094, 1100 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976) (when the trial is "impeccably fair and just" an erroneous failure to recuse is harmless error).

A judicial impropriety serious enough, and secret enough, to escape everyone's notice before trial probably also would be serious enough to create an actual conflict of interest. By the time the trial has been completed, an appearance of impropriety may have ripened into an actual impropriety. If it did not, and if no one asked for recusal before trial, then there is no need for still another trial to vindicate the concerns that underlie § 455(a).

It is regrettable that the vacation plans were not disclosed. This cast an unfortunate light on what was otherwise a well-handled trial. Judges and counsel should keep in mind the need to disclose unusual degrees of social as well as professional affiliation. The Webb-Kocoras vacation plans should have been disclosed. As it turns out, the silence did not adversely affect any substantial rights of Murphy. He could have protected himself fully by acting on the information he and Lydon possessed. At all events any appearance of impropriety under § 455(a) is not actual impropriety, so that recusal does not retroactively invalidate judicial acts that preceded the motion Murphy filed.

Both the circumstances concerning the vacation plans of the judge and the prosecutor, and the unavailability of a transcript of the conference on the jury instructions,

have led us to resolve all ambiguities in favor of Murphy. After this review we are confident that Judge Kocoras was scrupulously impartial in fact and conducted this trial in accord with the highest standards of the bench. Murphy has had a fair trial, and the judgment is just.

AFFIRMED

SWYGERT, *Senior Circuit Judge*, concurring specially. I concur fully with Parts I-IV of the court's opinion, although I am troubled in two respects. First, the proof of the interstate commerce requirement of the Hobbs Act and RICO hangs on a slim reed. Second, the use of the mails was so tangential to the success of the underlying frauds that the mail fraud convictions are also open to question. Nevertheless, this circuit's broad interpretation of both the interstate commerce elements and the mailings requirement dictate an affirmance of guilty on all these counts.

With respect to the recusal issue, I can concur only in the result ultimately reached by the court. I do not believe that a discussion of the merits of the recusal issue is necessary. Whether, at least in hindsight, the judge and prosecutor exercised poor judgment is irrelevant because the motion for recusal was untimely and waived.

The motion was filed several months after Murphy was sentenced. As such, it should be treated as a Fed. R. Crim. P. 33 motion for a new trial on the basis of newly-discovered evidence. In this circuit, such a motion could properly be entertained by the district court even though an appeal was pending. *See United States v. Ellison*, 557 F.2d 128, 132 (7th Cir.), *cert. denied*, 434 U.S. 965 (1977). Given defense counsel's close relationship and past vacation trips with the prosecutor and judge, the evidence supporting the recusal motion was not "newly-discovered evidence" within the meaning of Rule 33; had counsel exercised due diligence, the facts surrounding the

relationship between the prosecutor and judge would have come to light much earlier. Given this failure to exercise due diligence, Murphy has waived his right to present the merits of his recusal motion. In short, the defendant's strategy was to "lay in the weeds," a tactic that should have and did backfire.

Such a holding would not contradict the strict waiver and timeliness rules announced by this court in *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). There, the petitioner's right to be in court to present the recusal motion was not in question: the motion was filed in reference to a civil case pending trial. The issue here is whether the petitioner, subsequent to his conviction and sentence, has "waived" his right to get back in court to present new evidence. This is a distinct issue from whether, assuming the petitioner has a right to be in court in the first place, his right to require recusal has been "waived." *Morgan* applies only in the latter context; the case says nothing about the law of waiver and timeliness in the context of postconviction proceedings.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA 50234—Pandick Midwest, Inc., Chicago—7-19-85—450

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 27, 1985

**Before**

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

Nos. 84-2398 and 85-1401 v.

JOHN M. MURPHY,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 CR 979

Charles P. Kocoras,
*Judge*

## ORDER

Defendant-appellant filed a petition for rehearing and suggestion of rehearing en banc on September 12, 1985. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

**JUDGMENT AND PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date 08, 08, 84.

COUNSEL

☐ **WITHOUT COUNSEL** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **WITH COUNSEL** Matthias Lydon, Anna Lavin, Edward Calihan

PLEA

☐ **GUILTY,** and the court being satisfied that
☐ **NOLO CONTENDERE,** ☒ **NOT GUILTY**
there is a factual basis for the plea,

FINDING & JUDGMENT

There being a verdict of
- ☐ **NOT GUILTY.** Defendant is discharged
- ☒ **GUILTY.**

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully using the United States mails in executing a scheme and artifice to obtain money and property by means of false and fraudulent representations; knowingly conspire with others to conduct and participate in the conduct of the affairs of the Circuit Court of Cook County through a pattern of racketeering activity, as that term is

defined in Title 18, United States Code, Section 1961; did affect and attempt to affect commerce, as that term is defined by 18 U.S.C. § 1951 (b) (3), by extortion, as that term is defined by 18 U.S.C. § 1951 (b) (2)

In violation of Title 18, United States Code, Sections 2, 1341, 1951 and 1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

AUG 13, 1984

TEN (10) YEARS on each of Third Superseding Counts 18, 19, 20, 21, 24, 25, 26 and 27. Said Said sentence on each of these counts are to run concurrently with each other.

IT IS FURTHER ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of FIVE (5) YEARS on each of Third Superseding Counts 1 thru 5 and 7 thru 17. Said sentence on each of these counts are to run concurrently with each other, and are to run concurrently with the sentence imposed on Third Superseding Counts 18, 19, 20, 21, 24, 25, 26 and 27.

Remaining counts are dismissed on the government's oral motion.

Order same bond to stand pending appeal.

## ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

## COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Docketed Aug 16 1984

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
*U.S. District Judge*

Date: August 9, 1984

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-924

# In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN M. MURPHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

CHARLES FRIED
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

KAREN SKRIVSETH
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether, in the absence of any prejudice to petitioner, he is entitled to a new trial on the ground that the actions of the district court gave rise to an appearance of impropriety, for purposes of 28 U.S.C. 455(b), where petitioner did not seek to recuse the district court judge until after trial and sentencing.

2. Whether the Due Process Clause requires that petitioner's convictions on bribery-related offenses be reversed on the ground that the government's conduct of its investigation of corruption in the local judicial system was improper.

3. Whether petitioner's convictions should be reversed on the ground that the government's introduction of hearsay evidence before the grand jury deprived him of his right to indictment by an unbiased grand jury.

## TABLE OF CONTENTS


Page

Opinion below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 9

Conclusion ..... 17


## TABLE OF AUTHORITIES

Cases:


*Archer* v. *Commissioner of Corrections*, 646 F.2d 44, cert. denied, 454 U.S. 851 ..... 16

*Berry* v. *United States*, 528 F.2d 1094, cert. denied, 429 U.S. 826 ..... 11

*Berger* v. *United States*, 255 U.S. 22 ..... 11

*Fredonia Broadcasting Corp.* v. *RCA, Corporation*, 569 F.2d 251, cert. denied, 439 U.S. 859 ..... 12

*Glasgow, Ex parte*, 195 F. 780 ..... 11

*Hall* v. *SBA*, 695 F.2d 175 ..... 12, 13

*Hampton* v. *United States*, 425 U.S. 484 ..... 14

*Home Placement Service, Inc.* v. *Providence Journal Co.*, 739 F.2d 671, cert. denied, No. 84-844 (Jan. 21, 1985) ..... 11

*Lewis* v. *United States*, 385 U.S. 206 ..... 14

Page

Cases—Continued:

*Marty's Floor Covering Co.* v. *GAF Corp.*, 604 F.2d 266, cert. denied, 444 U.S. 1017 ..... 11

*Maryland* v. *Macon*, No. 84-778 (June 17, 1985) ..... 14

*People* v. *Best*, 97 Ill. App. 3d 1083, 424 N.E.2d 29 ..... 4

*Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, cert. denied, 449 U.S. 820 ..... 11, 12

*Roberts* v. *Bailar*, 625 F.2d 125 ..... 12

*Rogers* v. *United States*, 422 U.S. 35 ..... 12

*Rosenberg* v. *United States*, 360 U.S. 367 ..... 12

*Sherman* v. *United States*, 356 U.S. 369 ..... 14

*Sorrels* v. *United States*, 287 U.S. 435 ..... 14

*United States* v. *Agurs*, 427 U.S. 97 ..... 10

*United States* v. *Alexandro*, 675 F.2d 34, cert. denied, 459 U.S. 835 ..... 17

*United States* v. *Archer*, 486 F.2d 670 ..... 16

*United States* v. *Balistrieri*, No. 84-2001 (7th Cir. Nov. 12, 1985) ..... 9

*United States* v. *Carpentier*, 689 F.2d 21, cert. denied, 459 U.S. 1108 ..... 17

*United States* v. *Donovan*, 429 U.S. 413 ..... 12

*United States* v. *Jannotti*, 729 F.2d 213, cert. denied, No. 83-1891 (Oct. 9, 1984) ..... 13

Page

Cases – Continued:

*United States* v. *Jenrette*, 744 F.2d 817, cert. denied, No. 84-1171 (May 13, 1985) ..... 13

*United States* v. *Kelly*, 707 F.2d 1460, cert. denied, 464 U.S. 908 ..... 13

*United States* v. *Myers*, 692 F.2d 823, cert. denied, 461 U.S. 961 ..... 14

*United States* v. *Ritter*, 540 F.2d 459 ..... 12

*United States* v. *Russell*, 411 U.S. 423 ..... 14

*United States* v. *Silvestri*, 719 F.2d 577 ..... 13

*United States* v. *Smith*, 331 U.S. 469 ..... 10

*United States* v. *Weisz*, 718 F.2d 413, cert. denied, 465 U.S. 1027 ..... 13

*United States* v. *Williams*, 705 F.2d 603, cert. denied, 464 U.S. 1007 ..... 13

Constitution, statutes and rules:

U.S. Const. :

Art. I, § 6 (Speech or Debate Clause) ..... 14

Amend. V (Due Process Clause) ... 13, 14, 15, 16

Hobbs Act, 18 U.S.C. 1951 ..... 2

Jencks Act, 18 U.S.C. 3500 ..... 12

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d) ..... 1

18 U.S.C. 1341 ..... 2

28 U.S.C. 144 ..... 11

28 U.S.C. 455(a) ..... 5, 8, 9, 10, 12

Page

Constitution, statutes and rules—Continued:

28 U.S.C. 455(b) ..... 6, 12
28 U.S.C. 455(e) ..... 8
28 U.S.C. 1254(1) ..... 8
Fed. R. Crim. P. :
Rule 33 ..... 5, 7, 8, 10
Rule 43 ..... 12
Rule 45(b) ..... 10

Miscellaneous:

3 C. Wright, *Federal Practice and Procedure* (1982) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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No. 85-924

JOHN M. MURPHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 768 F.2d 1518.

### JURISDICTION

The judgment of the court of appeals was entered on July 19, 1985. A petition for rehearing was denied on September 27, 1985 (Pet. App. 36a). The petition for a writ of certiorari was filed on November 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to conduct and to participate in the affairs of an illegal enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d),

on seven counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and on 16 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to concurrent terms of ten years' imprisonment on the RICO and Hobbs Act violations and five years' imprisonment on the mail fraud counts. Pet. App. 8a. The court of appeals affirmed (Pet. App. 1a-35a).

1. The evidence adduced at trial, the sufficiency of which is not in dispute, is fully described in the court of appeals' opinion. Pet. App. 2a-8a. It showed that petitioner, a judge of the Cook County courts from 1972 until 1984, took bribes in three categories of cases: traffic court cases in which petitioner was paid a bribe by defense counsel in order to obtain a favorable disposition; criminal cases in which defendants were represented by attorneys known as members of the "Hustlers Club," who paid petitioner for referring cases to them; and criminal cases fixed by petitioner in exchange for bribes. Some of the evidence that related to the last two categories was derived from an undercover investigation known as "Operation Greylord," an investigation of official corruption in the Cook County courts involving judges, lawyers, police officers, sheriffs, and clerks, and in which FBI agents posed as dishonest lawyers and litigants in staged cases.[1]

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[1]Several paragraphs of the description of the mail fraud scheme are based in part on Operation Greylord cases (Count 1, paragraphs 3(d), (e), (f), (g), (i), (k)). Counts 6 and 7 charged Hustlers Club type offenses involving Operation Greylord cases; petitioner was acquitted on Count 6. Six of the 13 overt acts charged in the RICO conspiracy count involved Operation Greylord (Count 18, paragraphs 3(8)-(13)); petitioner was acquitted of the substantive offenses charged as two of the overt acts. Six of the nine extortion counts charged involved Operation Greylord cases (Counts 22-27); petitioner was acquitted on two of those counts (Counts 22 and 23).

The traffic court cases involved petitioner's actions as a judge assigned to Cook County traffic court from 1972 to 1981. Judge Richard LeFevour, the Supervising Judge of the traffic court, was responsible for assigning judges to individual cases. His cousin, James LeFevour, a Chicago police officer assigned to police court, served as an intermediary between Judge LeFevour and the other participants in the scheme, including petitioner. The scheme operated as follows: Dishonest defense counsel who sought to ensure a favorable outcome for their clients would tell James LeFevour which major traffic cases were theirs, and James LeFevour would pass the information on to Judge LeFevour. In turn, Judge LeFevour would assign these cases to those judges, including petitioner, who were willing to "see" James LeFevour (Pet. App. 3a), and these judges would then be notified by James LeFevour which cases should be fixed. In the cases assigned to him, petitioner would enter not guilty verdicts, regardless of the evidence, or he would place the defendant on "supervision," a form of deferral favorable for defendants, since it allowed them to avoid a judgment of conviction. Defense counsel would then pay the LeFevours for their services. Although petitioner did not share in the proceeds of these payments, Judge LeFevour assigned petitioner to major traffic cases more often than other judges, thereby placing him in a position to receive his own bribes. Between 1975 and 1980, James LeFevour and a second police officer, Joseph Trunzo, accepted bribes for petitioner from lawyers known as "miracle workers" because they never lost drunk driving cases. *Id.* at 2a-3a.

In 1981, Judge LeFevour became Presiding Judge of the Cook County First Municipal District, a court of general jurisdiction, and he assigned petitioner to a branch of this court that handled non-jury misdemeanor cases. The "Wrestlers Club" charges against petitioner stemmed from

his actions during this period. Hustlers were lawyers who solicited business in corridors from persons who were about to enter a courtroom. The attorneys received their fee in these cases by persuading their clients to sign over to them the refund on the cash deposit necessary to post bail.[2] In many cases, the charges against a defendant would be dismissed because the arresting officer failed to appear or because the complaining witness decided not to prosecute. Although the defendant did not need a lawyer in those cases, because he would be discharged anyway, the Hustlers unethically solicited these cases, and judges such as petitioner allowed these lawyers to obtain the refund for their presence during summary dispositions. The lawyers who comprised the Hustlers Club paid the LeFevours $2500 on a regular basis for permitting them to solicit cases. For his cooperation in the scheme, petitioner was able to permit hustling by other lawyers. For instance, petitioner was paid by attorney Arthur Cirignani for each case in which petitioner allowed Cirignani to receive the bail refund. Pet. App. 5a-6a.

Petitioner also accepted bribes in exchange for fixing a number of criminal cases. For example, in one case he received $300 for agreeing to suppress evidence.[3] Evidence of six other cases fixed by petitioner in exchange for bribes was also presented at trial. These cases were part of Operation Greylord. FBI agent Terrence Hake or David Ries appeared as a dishonest defense attorney representing an

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[2]Under Illinois law, a defendant required to post bail may deposit 10% of the bond amount in cash. When the defendant is discharged, the clerk will refund the cash deposit to him. The payment, known as a cash bond refund (CBR), can also be paid to defense counsel with the consent of his client and the court. Pet. App. 4a.

[3]The Illinois Court of Appeals reversed the suppression order. *People* v. *Best*, 97 Ill. App. 3d 1083, 424 N.E.2d 29 (1st Dist. 1981); see Pet. App. 6a.

FBI agent acting undercover as a criminal defendant charged with a crime and scheduled to be tried in petitioner's court; the complaining witness in each case also was an FBI agent acting undercover. In these cases, after petitioner found the "defendant" not guilty or terminated his supervision, an FBI agent, posing as defense counsel, paid James LeFevour or another police officer $200 or $300 to be delivered to petitioner and an additional sum for the officer. Pet. App. 6a-8a.

2. Petitioner was tried before United States District Judge Charles Kocoras, and he was sentenced on August 8, 1984. Nearly six months later, on February 7, 1985, petitioner filed a motion seeking the recusal of Judge Kocoras and a new trial. Petitioner's motion was supported by his own affidavit and that of two of his three trial counsel. In the motion, petitioner alleged that "newly discovered information" became available on or about August 17, 1984, that the United States Attorney, Dan Webb, who had served as the principal trial attorney for the government in this case, Judge Kocoras, and their families had vacationed together at the Calloway Gardens Resort in Pine Mountain, Georgia, shortly after petitioner had been sentenced. Petitioner's motion also alleged that the U.S. Attorney and Judge Kocoras were "close, personal friends," and that, if he had known that, he would have asked the judge to recuse himself and declare a mistrial (Pet. App. 24a-25a; Motion 2; Murphy Affidavit 4-5). Relying on 28 U.S.C. 455(a) and Fed. R. Crim. P. 33, petitioner argued that his due process and equal protection rights were abridged and that he was entitled to a new trial because Judge Kocoras' impartiality might reasonably be questioned.[4] Petitioner did not claim

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[4]28 U.S.C. 455(a) provides that:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

that Judge Kocoras harbored any actual bias or prejudice towards him.

The record reveals that in November 1983, before petitioner was indicted, Webb and Judge Kocoras reserved adjoining cottages at Calloway Gardens for themselves and their families for mid-August 1984 (Murphy Affidavit 4). On December 14, 1983, petitioner was first indicted and the case was assigned by lot to Judge Kocoras. The case was initially scheduled to be tried by an Assistant United States Attorney, but on May 29, 1984, Webb became lead prosecutor. *Id.* at 1-2; see U.S. C.A. Br. 71. The jury's verdict was returned on June 14. Sentencing was originally scheduled for August 31, but it was later advanced to August 8 so that the case could be completed before Judge Kocoras left on vacation. Thereafter, Webb and Kocoras took their vacations. Pet. App. 24a-25a.

At a hearing on petitioner's motion, Judge Kocoras made the following findings, which petitioner has not challenged: Judge Kocoras and petitioner's chief trial attorney, Matthias Lydon, attended law school together, where they were enrolled in a number of the same classes (3/1/85 Tr. 3-4). Judge Kocoras first met Dan Webb in 1971 when they became Assistant United States Attorneys in the Chicago office, where Lydon was already working as an attorney (*ibid.*). There, Judge Kocoras, Webb, and Lydon developed close professional and personal relationships (*ibid.*). Petitioner had been advised by Lydon before trial that the three men had been Assistant United States Attorneys in the same office, that Lydon and Webb had been law partners before Webb became the United States Attorney, and that the three men "were still friends" (*id.* at 5). Judge Kocoras also found that petitioner had acknowledged that he was

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Petitioner does not raise any claim under 28 U.S.C. 455(b) in the petition.

aware of this friendship in the presence of the probation officer who prepared his pre-sentence report (*id.* at 5). Judge Kocoras stated that "[w]hether Judge Murphy was pleased with those friendships or whether he thought they would benefit him, I cannot say. The record in this case is abundantly clear, however, that he was not disquieted by them" (*ibid.*). Finally, Judge Kocoras noted that the families of several persons who had served the federal government in the Chicago area had vacationed at Calloway Gardens for years, and that Lydon, Webb, and he had once vacationed there together with their families (*id.* at 4).

Following the hearing, Judge Kocoras denied petitioner's motion (3/1/85 Tr. 6). Rather than decide whether the motion was untimely under Fed. R. Crim. P. 33 or should be treated as a motion for a new trial based on newly discovered evidence, Judge Kocoras denied petitioner's motion on the merits (3/1/85 Tr. 6). He explained that petitioner had been convicted by an impartial jury on the basis of the evidence presented at trial and that he had imposed petitioner's sentence on the same basis (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-35a). The court found that, although there was no doubt that Judge Kocoras had in fact been impartial, the judge's vacation plans gave rise to an appearance of partiality, because "an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation" (*id.* at 27a-28a). However, the court found that the fact that petitioner's chief trial counsel was also a close friend of Judge Kocoras and had vacationed with him "removes some of the sting from the revelation about the vacation plans of the judge and the prosecutor" (*id.* at 29a). While the court declined to rule that petitioner had waived his disqualification claim by failing to raise it until after trial (*ibid.*), it held

that the nullification of an already-completed trial was not an appropriate remedy in this case because 18 U.S.C. 455(a) contemplates only prospective disqualification due to an appearance of bias (*id.* at 30a).

As the court explained, Section 455(e) allows the defendant to waive disqualification because of an appearance of bias but not because of actual bias. That difference, the court reasoned, demonstrates that an appearance of impropriety does not undercut personal rights and injures only the system as a whole (Pet. App. 31a). Therefore, given the substantial costs to the system from overturning an otherwise valid conviction, an appearance of bias is not a proper basis for reversing a conviction where the claim is raised for the first time after trial (*ibid.*). That result, the court noted, was supported by the fact that petitioner could have filed a pre-trial recusal motion, since he was aware of the friendship that Judge Kocoras, Webb, and Lydon shared, but chose not to raise this claim (*id.* at 32a).

In a concurring opinion, Judge Swygert stated that, given the close relationship between defense counsel and Judge Kocoras, the evidence offered in support of the motion was not newly discovered evidence under Fed. R. Crim. P. 33, that petitioner could have learned the facts surrounding the relationship between the judge and prosecutor with the exercise of due diligence, and that the failure to exercise due diligence constituted a waiver of the right to consideration of the merits of his recusal motion. Pet. App. 34a-35a.

The court of appeals also rejected petitioner's challenges to Operation Greylord, finding that the FBI agents played their roles in the manufactured cases without criminal intent, and that "Operation Greylord harmed only the corrupt" (Pet. App. 11a).

## ARGUMENT

1. The court of appeals held that 28 U.S.C. 455(a) does not require an appellate court to set aside a judgment where a motion for recusal is not filed until after trial and the basis for the claim is not the presence of actual bias but that the judge's actions gave rise to an appearance of partiality.[5] Petitioner claims (Pet. 13-21) that the court's decision is inconsistent with the text of 28 U.S.C. 455(a) and conflicts with rulings from other circuits. For several reasons, however, petitioner's claim does not warrant review by this Court.

First, the unusual facts giving rise to petitioner's claim are not likely to recur with the frequency necessary to justify review by this Court. Petitioner does not argue that the personal friendship among Judge Kocoras, the U.S. Attorney, and petitioner's principal trial counsel by itself provides a sufficient ground for disqualifying Judge Kocoras under Section 455(a). As the court of appeals observed (Pet. App. 26a-27a), such relationships are neither unusual nor disfavored. It would be unrealistic to require trial judges to abandon friendships developed before they were elevated to the bench or to enjoin them from acquiring new ones with counsel who appear in their court. The day-to-day management of the judicial process demands that district court judges be able to maintain a professional relationship with the members of the bar in order to ensure the efficient administration of the various aspects of the criminal process, such as the conduct of grand jury proceedings. That some of these relationships may also be ones of friendship should not materially affect a judge's ability to remain

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[5]In *United States* v. *Balistrieri*, No. 84-2001 (7th Cir. Nov. 12, 1985), slip op. 21, the court held that mandamus provides the sole remedy for a district court's denial of a disqualification motion under Section 455(a). That issue is not presented in this case, however.

disinterested and unbiased. The court of appeals was therefore correct in refusing to treat the well-known relationship among the three chief trial participants by itself as a ground for imputing bias to Judge Kocoras. It was only the coincidental timing of Judge Kocoras' and the U.S. Attorney's joint vacation plans that gave the court of appeals pause, and that fortuity is unlikely to recur.

Second, as Judge Swygert explained in his concurring opinion (Pet. App. 34a-35a), unless petitioner's recusal motion, which was filed nearly six months after sentencing, is treated as a motion for a new trial on the basis of newly discovered evidence, that motion is untimely under Fed. R. Crim. P. 33 and cannot provide a basis for relief, because the period established by that rule is jurisdictional. Fed. R. Crim. P. 45(b); *United States* v. *Smith*, 331 U.S. 469 (1947); 3 C. Wright, *Federal Practice and Procedure* § 558, at 360-361 (1982). However, petitioner has failed to meet the test for obtaining a new trial on the basis of newly discovered evidence. He does not suggest that Judge Kocoras was actually biased or that Section 455(a) imposes a jurisdictional limitation upon a trial court's authority to conduct a trial, and there can be no serious claim that the information concerning Judge Kocoras' and the United States Attorney's joint vacation plans would probably have led to his acquittal at trial. See *United States* v. *Agurs*, 427 U.S. 97, 111 (1976); 3 C. Wright, *supra*, § 557, at 315. Accordingly, petitioner has failed to state a claim for relief under Rule 33.

In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Section 455(a) itself is silent on the issue of the appropriate remedy where a disqualification motion is not filed until after trial, and petitioner has offered no sound reason why his trial should be nullified at this point in the absence of prejudice. As the court of

appeals explained (Pet. App. 30a-32a), retroactively upsetting a judgment on the ground that the trial judge's actions gave rise to an appearance of impropriety is unnecessary to safeguard any personal rights of the losing party and needlessly penalizes both a successful party and the system as a whole. Accord *Home Placement Service, Inc.* v. *Providence Journal Co.*, 739 F.2d 671, 677, 679 (1st Cir. 1984), cert. denied, No. 84-844 (Jan. 21, 1985) (refusing to invalidate damages portion of trial where a recusal motion was filed afterwards; reversing judgment only as to award of attorneys' fees, which followed the filing of the motion). In fact, ordering a new trial would be particularly inappropriate in this case, given petitioner's knowledge of the longstanding and open friendship between Judge Kocoras and the U.S. Attorney. Cf. *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), cert. denied, 449 U.S. 820 (1980) ("a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy"); see also *Barry* v. *United States*, 528 F.2d 1094, 1100 (7th Cir.), cert. denied, 429 U.S. 826 (1976) (any error in judge's failure to recuse himself was harmless where defendant did not question fairness of trial).

The court of appeals' decision also does not "nullif[y] the plain language of Section 455(a)," as petitioner suggests (Pet. 16). Under 28 U.S.C. 144, once an affidavit is filed alleging that a judge is actually biased, the judge must cease acting in the case, but the filing of the affidavit does not nullify previous actions taken by the judge. See *Marty's Floor Covering Co.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980) (disqualification under 28 U.S.C. 144 is prospective only; denying motion for a new trial); cf. *Berger* v. *United States*, 255 U.S. 22, 31-32, 35 (1921) (citing with approval *Ex Parte Glasgow*, 195 F. 780 (N.D. Ga. 1912), which held that the predecessor to 28 U.S.C. 144 did not provide a remedy after the completion of trial). It would thus make little sense to

nullify an entire trial when only a charge of an appearance of impropriety is made.[6]

Petitioner errs in claiming (Pet. 13-16) that the court of appeals' decision in this case conflicts with rulings from other circuits construing 28 U.S.C. 455(a). Only one decision cited by petitioner (Pet. 15) reversed a judgment under Section 455(a) where the claim was not raised until after trial, *Hall* v. *SBA*, 695 F.2d 175 (5th Cir. 1983),[7] and, as the court of appeals noted (Pet. App. 30a n.3), *Hall* is best viewed as an example of actual bias imputed to the court. There, a magistrate's law clerk had resigned from the defendant agency after complaining of gender discrimination, but assisted the magistrate in deciding a gender discrimination class action suit, in which she was once a member of the plaintiff class, brought against her former employer. When this fact was brought to his attention before trial, the magistrate declined to recuse himself or to disqualify his law clerk, and he allowed his clerk to assist him draft his opinion in the case, which she continued to do

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[6] In other settings as well, this Court has refused to adopt a per se rule requiring a conviction to be reversed because of a statutory violation. See *Rosenberg* v. *United States*, 360 U.S. 367, 370-371 (1959) (violation of the Jencks Act, 18 U.S.C. 3500); see also *Rogers* v. *United States*, 422 U.S. 35, 40 (1975) (violation of Fed. R. Crim. P. 43); cf. *United States* v. *Donovan*, 429 U.S. 413 (1977) (violation of federal wiretap laws does not automatically require suppression).

[7] *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), cert. denied, 449 U.S. 820 (1980), expressly reserved this issue; the court vacated the judgment because of a violation of Section 455(b), which is not at issue here. In both *Roberts* v. *Bailar*, 625 F.2d 125, 127 (6th Cir. 1980), and *Fredonia Broadcasting Corp.* v. *RCA Corporation*, 569 F.2d 251, 254 (5th Cir. 1978), cert. denied, 439 U.S. 859 (1978), a pretrial disqualification motion was filed. *United States* v. *Ritter*, 540 F.2d 459 (10th Cir. 1976), was a pretrial mandamus proceeding. The remaining court of appeals decisions cited by petitioner either found no violation (or a waiver) of Section 455(a) or were concerned with Section 455(b).

after accepting a job offer from the plaintiffs' law firm. The court of appeals found that the magistrate erred in part in "failing voluntarily to disqualify himself or to insulate himself from his clerk on the facts known to him before he rendered judgment" (695 F.2d at 180). *Hall* was therefore not merely a case in which the judge's impartiality might be questioned.

2. Petitioner contends (Pet. 21-23) that the government's conduct of Operation Greylord was so outrageous that the Due Process Clause requires that his convictions be set aside.[8] He argues that the government's conduct amounted to a fraud on the courts that is offensive to principles of fundamental fairness. However, as the court of appeals recognized (Pet. App. 9a), the conduct of the government's investigation in Operation Greylord is not materially different from the type of undercover operation that the government carried out in the Abscam investigation. There, the courts of appeals uniformly rejected the contention that the government's conduct violated the Due Process Clause, and this Court consistently denied review. See, *e.g.*, *United States* v. *Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), cert. denied, No. 84-1171 (May 13, 1985); *United States* v. *Jannotti*, 729 F.2d 213 (3d Cir. 1984), cert. denied, No. 83-1891 (Oct. 9, 1984); *United States* v. *Silvestri*, 719 F.2d 577, 581 (2d Cir. 1983); *United States* v. *Weisz*, 718 F.2d 413, 440-441 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *United States* v. *Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983); *United States* v. *Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983);

[8]Only five of the 24 counts on which petitioner was convicted were based solely on Operation Greylord cases, and the sentences he received for those counts are in each instance concurrent with the sentences he received in actual cases.

*United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Petitioner's claim is equally insubstantial.[9]

As the court of appeals correctly noted (Pet. App. 9a-11a), the government's use of undercover officers is essential to the investigation of certain crimes, such as bribery. See *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 6; *Lewis* v. *United States*, 385 U.S. 206, 210 n.6 (1966). While it is true that the undercover agents conceived and executed important aspects of the scheme to uncover bribery in the local judicial process, and that the crimes charged against petitioner would not have occurred in this manner if the government had not been so involved, that is also routinely true of undercover operations and has never been thought sufficient to bar a prosecution of a willing participant. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrels* v. *United States*, 287 U.S. 435, 441 (1932). That is all the agents did here; by acting as participants in the judicial process, the agents here simply reproduced circumstances likely to arise and recur in the Cook County courts and provided judges like petitioner who were willing to be corrupted with an opportunity to reveal their true colors. As the court of appeals put it, "[t]he Government offered Murphy opportunities to sell the powers of his office and disgrace himself. He accepted with alacrity." Pet. App. 10a (footnote omitted).

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[9]Moreover, the Speech or Debate Clause and separation of powers claims advanced in the Abscam cases have no counterpart here.

Petitioner does not contend that undercover operations are generally forbidden; rather, his argument hinges upon the claim that the agents' participation in cases that were artificially created for the purpose of discovering corrupt judges constitutes a misuse of the judicial process to bring about a conviction. However, petitioner has failed to offer a principled distinction between the type of investigation that was carried out here and that performed in other circumstances where bribery or extortion is the focus of inquiry.

The purpose of Operation Greylord was to investigate allegations of corruption in the Cook County judicial system. The government's need to use undercover agents in a manner that made them appear to be actual parties in the judicial process was therefore obvious and indisputable. Just as an agent must often take part in the actual sale of narcotics to identify persons who traffic in contraband, so too an agent must engage in acts of bribery to investigate official corruption. Because "[c]ases are the daily work of courts" (Pet. App. 10a), if corruption takes place in the judicial process, agents must necessarily provide judges with "an opportunity suitable to their calling" (*ibid.*). The undercover agents' participation in the "cases" put together for the purpose of their investigation was therefore entirely appropriate; indeed, given the nature of the investigation, the agents could scarcely have done otherwise. Accordingly, unless the Due Process Clause imposes standards for the investigation of dishonest judges that differ from those applied in other investigations of corrupt government officials, the fact that Operation Greylord required undercover agents to become involved in the judicial process does not provide a basis for treating this case in a unique fashion.

Nor does it matter that the agents gave fabricated testimony in the cases in dispute. The "perjury" committed in these cases is no more offensive to due process than the "sale" of narcotics in *Lewis*. In each case, as the court of

appeals recognized (Pet. App. 10a), the agents' conduct is an indispensible element of an undercover operation and does not constitute a crime because the element of scienter is absent. In addition, given the fact that state and local officials were notified of the investigation (*id.* at 11a), there can be no claim that the Greylord investigation offended the local judicial process (assuming that petitioner has standing to assert any such claim).

Petitioner erroneously asserts (Pet. 22-23) that the court of appeals' decision conflicts with *United States* v. *Archer* (*Archer I*), 486 F.2d 670 (2d Cir. 1973). There, the court reversed the defendants' convictions on the ground that the federal agents had deliberately fabricated federal jurisdiction by making and causing the defendants to make long-distance telephone calls that served no purpose other than to provide the jurisdictional basis for converting a state offense into a federal crime. Here, by contrast, "[t]he prosecutors did not move a state crime to a federal court by main force" (Pet. App. 9a). Petitioner's claim is thus materially different from the claim upon which the court reversed the convictions in *Archer I*; his claim is that the government unlawfully "manufactured" the crime (Pet. App. 9a). As explained above, that claim warants no further review.

In this regard, petitioner relies (Pet. 22-23) on dicta in *Archer I* criticizing the conduct involved in the investigation in that case. See 486 F.2d at 674-677. However, *Archer I* expressly reserved the question whether that conduct was so offensive that the defendants' convictions must be set aside (*id.* at 677), and in *Archer* v. *Commissioner of Correction* (*Archer II*), 646 F.2d 44, 46-47 (2d Cir.), cert. denied, 454 U.S. 851 (1981), a state prosecution stemming from the same investigation, the court held that the conduct criticized in *Archer I* was not so outrageous as to violate the Due Process Clause. Moreover, since *Archer I* was decided,

the Second Circuit has never ruled that the Due Process Clause forbids the criminal prosecution of a willing participant. See, e.g., *United States* v. *Carpentier*, 689 F.2d 21, 26-27 (2d Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Alexandro*, 675 F.2d 34, 39-41 (2d Cir.), cert. denied, 459 U.S. 835 (1982).

3. Finally, petitioner apparently contends (Pet. 23-24) that the prosecutor's use of the hearsay statements of James LeFevour before the grand jury deprived him of the right to an indictment by a fair and unbiased grand jury. The court of appeals correctly rejected this insubstantial claim (Pet. App. 18a-20a), which, petitioner concedes, entails no conflict among the circuits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986

DOJ-1986-01

No. 85-924

Supreme Court, U.S.
FILED
FEB 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

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OCTOBER TERM, 1985

JOHN M. MURPHY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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## TABLE OF CASES


| | PAGE |
|---|---|
| *Clancy* v. *U.S.*, 365 U.S. 312 | 8 |
| *Dobson* v. *Camden*, 502 F. Supp. 679 | 6, 9 |
| *Hall* v. *SBA*, 695 F.2d 175 (CA-4, 1983) | 6, 8, 9 |
| *Home Placement Service* v. *Providence Journal Co.*, 739 F.2d 674 (1st Cir., 1984) | 6, 8, 9 |
| *McDaniel* v. *Temple Ind. School Dist.*, 770 F.2d 1340 (1985) | 11 |
| *Miller Industries* v. *Caterpillar Tractor Co.*, 516 F. Supp. 84 | 6, 8 |
| *People* v. *Jackson*, 213 CAL. REP. 521 | 6, 8 |
| *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101 at 112 (5th Cir., 1980) | 3, 4, 5, 6, 8, 9, 10 |
| *Roberts* v. *Bailar*, 625 F.2d 125 (CA-6, 1980) | 6, 8 |
| *Rogers* v. *U.S.* 422 U.S. 35 (1975) | 7, 8 |
| *Rosenberg* v. *U.S.*, 360 U.S. 367 (1959) | 7, 8 |
| *United States* v. *Berger*, 295 U.S. 78 | 10 |
| *United States* v. *Lilla*, 699 F.2d 99 (1983) | 8 |
| *United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir., 1974) | 1 |
| *United States* v. *Donovan*, 429 U.S. 413 (1975) | 7, 8 |
| *United States* v. *Lilla*, 699 F.2d 99 | 8 |
| *Williams* v. *U.S.* (Pet. Cert., No. 85-6080) | 1, 3, 5 |

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

This Petition questions the integrity of the judges of the Northern District of Illinois, Eastern Division, and of the 7th Circuit Court of Appeals as it applies to both obedience to and enforcement of 28 U.S.C. 455, a statute enacted and amended to assure the appearance of impartiality in every U. S. Court.

Since many (if not most) of the judges of said courts are former Assistant U. S. Attorneys, and since this petitioner, (and the companion petitioner in *Williams* v. *United States,* No. 85-6080) raise the same issue (alleged violations of 28 U.S.C. 455 by District Court Judge Charles Kocoras), it is necessary for the restoration of that integrity that this Court grant certiorari and compel enforcement of the duties imposed by said statute, since "protection of the integrity . . . of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States* v. *Columbia Broadcasting Systems, Inc.,* 497 F.2d 107, 109 (5th Cir., 1974).

That issue has not been addressed by the brief in opposition. Instead, it contains false statements and is misleading and seeks to divert the Court's attention from the underlying issue herein: A judge's *duty* under 28 U.S.C. § 455(a) to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

### A. False Statements in Brief in Opposition

1. The Brief in Opposition (p. 6) states: "At a *hearing* on petitioner's motion, Judge Kocoras made the following *findings,* which Petitioner has not challenged." (Emphasis supplied)

The *fact* is, as shown by petitioner's Statement of Facts as [to] 28 U.S.C. § 455(a) Proceedings (Pet. p. 8), ". . . the trial judge denied petitioner's motion, *without hearing*" (Emphasis supplied, Rec. 128, App., Trans., March 1, 1985, pp. 3-6).

As shown by the record herein, (Rec. 128; App. Trans. pp. 3-6), *there was no hearing* and *Judge Kocoras made no findings.* Instead, the proceeding was a one-man-show with the judge making inaccurate, self-serving statements. The principal inaccuracy by the judge then is cited in the opposition brief (p. 6): "Judge Kocoras also found that petitioner had acknowledged that he was aware of this friendship [between Judge Kocoras, U.S. Attorney Webb and petitioner's principal trial attorney, Lydon] in the presence of the probation officer who prepared his pre-sentence report."

The facts are: 1) as shown by petitioner's affidavit filed in support of his Section 455(a) motion (Rec.119, Ex.C), at no time was petitioner told by Lydon, nor did he have any knowledge, of the existence of a close personal relationship between said Judge and Prosecutor. Also, Lydon's Affidavit (Rec. 119, Ex. B) stated that Lydon "did not discuss in detail [with petitioner] any relationship" between said judge and said prosecutor, but told petitioner that he, the judge and the prosecutor had "all worked together in the U. S. Attorney's Office and that all were still friends. Lydon's affidavit further stated he "recalls no further discussion with Murphy of any personal relationship among Judge Kocoras, Dan Webb, or himself." and, 2) the probation officer's affidavit filed by the Government (Rec. 122, Ex. A), stated "During the course of this conversation Mr. Murphy commented that some people had suggested to him that he should not have hired Matt Lydon as his attorney because of his friendship with Dan Webb and Judge Kocoras. Mr. Murphy said he responded to these people that he thought Mr. Lydon had done a very good job of representing him at trial."

Those statements in the probation officer's affidavit do not contradict either the affidavit of Lydon or Murphy as to petitioner's *unawareness* of the close personal relationship between Judge and prosecutor herein. Nor can they logically or fairly support the erroneous interpretation of them made by

Judge Kocoras. Clearly, they could not support the "finding" that the opposition brief (p. 6) falsely attributes to them.

2. This statement in the opposition brief (p. 9) is false:

> "... the unusual facts giving rise to petitioner's claims are not likely to recur with the frequency necessary to justify review by this Court.[1]

The falsity, of that assertion is shown by the following, *unchallenged* statement in the petition herein: (p. 13, fn. 3):

> "*Identical disregard of his duty to disqualify himself under 28 U.S.C. 455(a) by the same trial judge as herein occurred in United States v. Rovetusso,* 768 F. 2d 809" (Pet. 13, fn. 3)

See also *Williams* v. *United States,* No. 85-6080, which petitioner therein has asked this Court to consider together with the petition herein to enable this Court to evaluate Judge Kocoras' *repeated* violations of Section 455(a) in their context.

3. The brief in opposition (p. 12) falsely states:

> "*Potashnick* v. *Port City Construction Co.,* 609 F.2d 1101, 1111 (5th Cir.) cert. denied, 449 U.S. 820 (1980) expressly reserved this issue [whether a court would reverse a judgment under § 455(a) when the claim was not raised until after trial]; the court vacated the judgment because of a violation of § 455(b), which is not at issue here."

*Each of those statements is false:*

a. As shown by the opinion in *Potashnick* (609 F.2d at 1115), the issue reserved by the court there was whether a reversal on § *455(b)(5)(iii)* grounds

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[1] Such an argument suggests, contrary to the plain meaning of the statute and without any supporting authority, that every judge is allowed to violate his duty under Section 455(a) at least once with impunity. It nullifies the statute.

> would be foreclosed by Port City's failure to raise the issue of disqualification, or even to make an issue when invited to do so by the judge, until judgment was entered against it.
>
> The issue here is completely different: whether, as the 7th Circuit opinion (Pet. App. 33a) says: "Judicial acts taken before the [*455(a)*] motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice."

***Potashnick did not reserve that issue.*** Rather, on finding the trial judge should have disqualified himself under § 455(a), *Potashnick* reversed and remanded—even though the 455(a) motion was made *after* trial, as was done herein.

Thus, petitioner's citation of *Potashnick* as directly contrary to the 7th Circuit opinion here is correct; and, the opposition brief's statement to the contrary is false.

b. The falsity of the opposition brief's statement ("the [Potashnick] court vacated the judgment because of a violation of § 455(b), which is not an issue herein") is shown by the following statements in *Potashnick:*

> "We believe that a reasonable person with knowledge of the business investments of Judge Hand and Paul Brock and the legal representative of the judge by Brock might very well question the judge's impartiality in a trial involving Paul Brock as chief counsel for a litigant."
>
> "In deciding that Judge Hand should have disqualified himself under 28 U.S.C. 455(a) on the grounds discussed above we note . . ."
>
> "This court has decided that Judge Hand was disqualified for participating in the *Potashnick* proceeding *on two separate grounds.*" [455(a) and 455(b)] (690 F.2d at 1111, 1113, 1114; emphasis supplied)

As stated in the petition herein (p. 16), *Potashnick* reversed and remanded because of the court's finding an *appearance* of partiality in violation of Section 455(b)—even though

the motion for disqualification was made *after* trial and even though "none of the parties allege[d] any bias or prejudice in [the judge's] handling of the matter." (690 F.2d at 1112). Thus, as stated in the petition herein, *Potashnick* conflicts with the 7th Circuit opinion herein; and the opposition brief's description of it is false.

4. The opposition brief (p. 10) speaks of the "well known relationship" among the three chief trial participants, and (p. 11) of "petitioner's knowledge of the longstanding and open friendship between Judge Kocoras and the U.S. Attorney."

Both statements are false, as shown by the fact that there is no evidence in the record to support them; (none is cited in the opposition brief). Their falsity is further shown by the *uncountered* affidavits (Rec. 126, Ex. A, C) of petitioner and his additional trial attorney, Edward Calihan, stating that prior to trial herein neither of them had any knowledge of the existence of any close personal relationship between the judge and prosecutor.[2]

The falsity of the Solicitor General's unsupported assertion that "the friendship between Judge Kocoras and the U. S. Attorney was open" is further shown by the Petition for Removal of Judge Kocoras (filed under circumstances similar to those herein) in *Williams* v. *United States*, (Pet. No. 85-6080, App. 3a), where Defendant's trial attorneys stated they were aware that Judge Kocoras and U. S. Attorney Webb (the personal prosecutor of that case also) were friendly toward one another, but [were] unaware of a friendship that was not only of long duration, but was intimately personal, and was not the sort of friendly political relationship common among officeholders."

Moreover, the record herein shows that Judge Kocoras failed to disclose his "open" friendship with the prosecutor, just as (despite his sworn duty under Section 455) he failed to

[2] No counter-affidavits were filed by said judge or said prosecutor.

disclose his then-pending reservations for post-trial vacation with said prosecutor.[3] What openness!

## B. MISLEADING STATEMENTS IN THE BRIEF IN OPPOSITION

1. The opposition brief is misleading in that it ignores petitioner's following arguments demonstrating the error of the 7th Circuit opinion:

- 7th Circuit holding requiring a showing of *actual* prejudice under Section 455(a) *conflicts* with rulings of other circuits and is *self-contradictory;*
- that holding is based on *inapplicable* cases;
- Section 455(a) has uniformly been read as being *mandatory* and *self-enforcing* in prior 7th Circuit opinions.

2. Also misleading (if not false) is the opposition brief's argument (p. 10) characterizing the timing of Judge Kocoras' and the prosecutor's joint vacation plans as "coincidental".

As shown by the circuit court opinion, there was nothing "coincidental" about their joint vacation:

> "*The trip had been planned before the trial,* and Judge Kocoras [sua sponte] advanced the date of sentencing so that he could *wrap up* the Murphy case before going on vacation with the Webb family. This was not an isolated event. The Webbs and Kocorases had

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[3] Failure of a trial judge to disclose pretrial his pending reservations for a post-trial vacation with the U.S. Attorney prosecuting the trial before him should *itself* to warrant disqualification pursuant to Section 455(a). See *Potashnick, supra, Roberts* v. *Bailar,* 625 F.2d 125, (6th Cir. 1980), *Home Placement Service, supra. Hall* v. *SBA,* 695 F.2d 175 (4th Cir. 1983); *Miller Ind.* v. *Caterpillar Tractor Co.,* 516 F.Supp. 84 (1980); *Dobson* v. *Camden,* 502 F.Supp. 679 (1980); *People* v. *Jackson,* 213 Cal. Rep. 521 (1985). Significantly, the opposition brief's argument does not even mention Judge Kocoras' failure to disclose his plans for post-trial vacation with the prosecutor.

> vacationed together at Calloway Gardens in 1982". (Pet., App. 25a; emphasis supplied)

Thus, that planned, joint vacation which the opposition brief argues is a "fortuity not likely to recur" had occurred previously, as found by the 7th Circuit opinion and as related in *Williams* v. *U.S.*, (pending herein as No. 85-6080).

The grave harm to petitioner of such argument is that it may mislead the Court into failing to evaluate this petition as relating to but the *latest* of Judge Kocoras' *repeated* violations of his duty under 28 U.S.C. 455(a).

3. As stated in the petition (p. 16):

> "That [7th Circuit] holding [requiring a showing of *actual* impropriety or prejudice] nullifies the plain language of Section 455(a)"

The brief in opposition (p. 11) doesn't address that argument, but misleadingly makes an assertion to the contrary and cites several cases pertaining to an altogether different statute: 28 U.S.C. *144*. The opposition brief (p. 12, fn. 6) increases its potential misleading of the Court by stating:

> "In other settings as well, this Court has refused to adopt a per se rule requiring a conviction to be reversed because of a statutory violation. See *Rosenberg v. United States*, 360 U.S. 367 (1959) . . . ; . . . *Rogers v. United States*, 422 U.S. 35 . . . of *United States v. Donovan*, 429 U.S. 413 . . ."

*None* of those cases supports the Solicitor General's assertion: *Rosenberg* held that failure to provide one Jencks Act statement (where 5 others were tendered) was "harmless error" since the subject information had otherwise been made available to the defendant; *Rogers* reversed a conviction *because* of violation of Fed. R. Crim. P. 43; and, in *Donovan* the court found no substantive violation of federal wiretap laws. Thus, not only do the cited cases fail to support the Solicitor General's assertion, they *disprove* it: because in both *Rosenberg* and *Donovan*, *if* the court *had* found a violation of the relevant statutes, it would have reversed those convictions as well. See *Clancy* v. *U.S.*, 365 U.S. 312; *U.S.* v. *Lilla*, 699 F.2d 99.

4. Further misleading is the opposition brief's argument (p. 12) that "Only one decision cited by petitioner (Pet. 15) reversed a judgment under Section 455(a) where the claim was not raised until after trial, *Hall v. SBA* . . ."[4]

That statement is incorrect. *Each* of the following cases cited in the petition (plus *Hall)* reversed a judgment under Section 455(a) even though the claim was not raised until *after* trial: *Potashnick v. Port City Construction Co., supra; Home Placement Service v. Providence Journal Co.,* 739 F.2d 674 (1st Cir., 1984); *Roberts v. Bailar,* 625 F.2d 125, *supra; Miller Industries v. Caterpillar Tractor Co., supra; People v. Jackson, supra.*

The opposition brief misleadingly argues (p. 12) that "*Hall* is best viewed as an example of actual bias imputed to the court." That argument is misleading because: 1) it ignores the finding in *Hall,* cited in the petition (p. 18), that the continuing participation of a magistrate's law clerk in a case before him which the clerk's future employers were counsel "gave rise to an *appearance* of partiality." (emphasis supplied); 2) it also ignores the court's statement in *Hall* that "there is not the slightest hint that [the magistrate] in fact engaged in any improper conduct,"; and, 3) it also ignores the very first sentences of the court's opinion in *Hall:* "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable *appearance.* Purity of heart is not enough. *Judge's robes must be as spotless as their actual conduct."* (Emphasis supplied)

In the face of such language from *Hall,* for the opposition brief to argue (as does the 7th Circuit opinion) that "*Hall* is best treated as an example of actual bias imputed to the court is

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[4] Footnote 7 following this sentence in the opposition brief is also incorrect. See p. 4, 5 herein as to its error regarding *Potashnick.* The pre-trial motion in *Roberts* v. *Bailar* claimed a violation of 28 U.S.C. *144.* All of the cases cited on p. 15 of the petition (except *McCuin* v. *Texas Power & Lt. Co.)* related to Section 455(a). *Each* such case affirmed that Section 455(a) is concerned only with the *appearance* of partiality or bias, as argued (p. 13-16) in the petition.

to blind itself to fact and so to demean the fairness and high quality of legal analysis rightfully expected from both a court of appeals and the Solicitor General. Contrast that opposition brief argument with *Dobson v. Camden,* 502 F. Supp. 679, 681 (1984) where recusal was ordered. Implementing the purpose of Section 455(a) and this Court's principle that "justice must satisfy the appearance of justice," the court there deemed it advisable in a Section 455(a) case to "bend over backwards to eliminate any possible taint on the judicial process."

Can this Court do less when here confronted with Judge Kocoras' *repeated* violation of 28 U.S.C. 455(a)?

**C. The "Cost" of Disqualification Necessitated by Judge Kocoras' Violation of Section 455(a) Should Not be Charged to Petitioner.**

The opposition brief (p. 11) argues:

> "upsetting a judgment on the ground that the trial judge's actions gave rise to an appearance of impropriety is unnecessary to safeguarding any personal rights of the losing party and needlessly penalizes both a successful party and the system as a whole" (citing *Home Placement* and *Potashnick)*

*Home Placement* is inapplicable because there the parties had stipulated the evidence to be considered on the issue of damages. Therefore, in granting a post-trial recusal motion, the court remanded only as to the issue of attorney's fees. Thus, the case is *not* precedent for denying a new trial upon granting a post-trial motion for recusal. Furthermore, upon granting such a motion, *Potashnick* does order a complete new trial.

Also in *Potashnick,* addressing a similar "costliness of reversal upon post-trial motion for recusal" argument (regarding a 33-day trial with a 25-volume record), the court said:

> "The unfairness and expense which results from disqualification . . . can be avoided . . . only if each judge fully accepts the *obligation* to disqualify himself in any case in which his impartiality *might* reasonably be questioned.[10]

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"10. Recognizing the considerable confusion surrounding the law of disqualification in the past, we *emphasize* the

> clear path of the future." (609 F.2d at 1115, emphasis supplied)

Thus, under *Potashnick*, the failure of Judge Kocoras to accept his obligation under Section 455(a) *requires* his disqualification *despite* the expense that may cause. (It is ironic that the government (which, by the U.S. Attorney's co-equal silence, abetted Judge Kocoras' disregard of his duty) should now complain of the cost of disqualification caused by the judge's and prosecutor's disregard of duty.)

The opposition brief (p. 11) further argues that "a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy." However, the *uncountered* affidavits supporting petitioner's motion for recusal and new trial establish that petitioner attempted no such strategy here. Moreover, corrollary is the principle, codified by section 455(a), that no judge should be permitted to disregard with impunity his sworn duty to appear impartial by keeping secret, before and during trial, his close, personal relationship (and pending reservations for post-trial vacation) with the U.S. Attorney[5] prosecuting defendant before him.

## CONCLUSION

Certiorari is required here because "The appearance of prejudice is in itself a blight on the trial of a case that warrants a new trial, even if we were persuaded that the case would have come out no differently." (*McDaniel v. Temple Ind. School Dist.*, 770 F.2d 1340, 1352 (dissent; 5th Cir., 1985).

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[5] The co-equal secrecy by the U.S. Attorney (Dan Webb) is equally reprehensible and a violation of *his* duty. (*U.S. v. Berger*, 295 U.S. 78, 88)